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IN THE

Supreme Court of the United States

October Term, 1962

No. 512

BRADLEY REED SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

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IN THE

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No.....

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PEOPLE OF THE STATE OF CALIFORNIA,

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Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, entered in the above-entitled case on October 24, 1962.

Opinions Below.

The opinion and judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles [C. T. 109-117][1] is unreported. A copy of the said opinion and judgment is attached hereto as Appendix A.

[1]The reference "C. T." is to the transcript of the record prepared and certified by the clerk of the court below.

Jurisdiction.

The judgment of the court below [C. T. 114] was dated and entered on October 24, 1962. By order of Mr. Justice Douglas dated January 11, 1963, the time to file this petition for writ of certiorari was extended to and including February 13, 1963.

On October 24, 1962, the same date as the rendition of its opinion, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles made and entered an order in the case entitled: Order Certifying Cause to District Court of Appeal [C. T. 118]. Calif. Penal Code 1471; Calif. Rules of Court, Appellate Rules, *Rules on Transfer of Municipal and Justice Court of Appeals*,[2] Rule 63. A copy of the said Order is attached hereto as Appendix B.

On November 15, 1962, the District Court of Appeal of the State of California for the Second Appellate District, Division Three, made and entered an order in the case entitled: Order Denying Transfer on Certification, the Honorable Gordon L. Files, a Judge of said Court, voting to grant transfer [C. T. 119]. Calif. Penal Code 1471; Calif. Rules of Court, Appellate Rules, *Rules on Transfer of Municipal and Justice Court of Appeals*, Rule 62. A copy of the said Order is attached hereto as Appendix C.

The decision of the aforesaid District Court of Appeal denying transfer in the case herein became final immediately upon its filing on November 15, 1962. Calif. Rules of Court, *Appellate Rules*, Rule 24(a). The

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[2]Adopted by the Judicial Council of the State of California, effective January 2, 1962.

California Supreme Court did not order the cause transferred to itself on its own motion within thirty days after the said decision became final (Calif. Rules of Court, *Appellate Rules*, Rule 28(a)), and a petition for hearing in the California Supreme Court "may not be filed after denial of a transfer to a District Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court" (*Id.*, Rule 28(b)).

By the aforesaid denial of transfer, therefore, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles became the highest court of the State in which a decision could be had. Calif. Constitution, Article VI, §§ 4, 4b, 4e, 5; Calif. Penal Code 1471; Calif. Rules of Court, Appellate Rules, *Rules on Transfer of Municipal and Justice Court of Appeals*, Rule 61 *et seq.*; Calif. Rules of Court, *Appellate Rules*, Rules 24(a), 28(a), 28(b). *Smith v. California*, 361 U. S. 147, 148, fn. 2; *Virginia Ry. Co. v. Mullins*, 271 U. S. 220, 222.[3]

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3) since the validity of a state statute on grounds of repugnancy to the Constitution of the United States was and is drawn in question and rights, privileges and immunities were and are specially set up and claimed under the Constitution of the United States.

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[3]See also, 36 Cal. S. Bar J. 890-907 (1961); 37 Cal. S. Bar J. 265-266 (1962).

Questions Presented.

1. Whether the sale of *Tropic of Cancer* by Henry Miller is not protected against criminal punishment by the guarantees of free expression afforded by the First and Fourteenth Amendments.

2. Whether California Penal Code 311.2, as construed and applied to the sale of *Tropic of Cancer* by petitioner, deprives petitioner of liberty of speech and press without due process of law contrary to the free speech and press provisions of the First Amendment subsumed into the due process clause of the Fourteenth Amendment as a limitation on state action.

3. Whether California Penal Code 311.2, as construed and applied to the sale of *Tropic of Cancer* by petitioner, fails to provide reasonably ascertainable standards of guilt and therefore deprives petitioner of his liberty without due process of law contrary to the due process provision of the Fourteenth Amendment.

4. Whether California Penal Code 311.2, as construed and applied to punish the sale of *Tropic of Cancer* by petitioner because deemed to be utterly without redeeming social importance to the "average person" in the "Los Angeles community," abridges the freedoms of speech and press and deprives petitioner of his liberty without due process of law and denies petitioner the equal protection of the laws contrary to the free speech and press, due process and equal protection provisions of the First and Fourteenth Amendments.

5. Whether California Penal Code 311.2, as construed and applied to punish the sale of *Tropic of Cancer*, the dominant theme of the said book, taken as a

whole, not appealing to prurient interest nor going beyond contemporary community standards in the description of sex, and believed by petitioner to have ideas of redeeming social importance and therefore not obscene, deprives petitioner of liberty of speech and press and permits petitioner's conviction without evidence of guilt contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

6. Whether the rulings and the instructions of the trial court, and refusal to instruct, with respect to the standards for judging the alleged obscenity of *Tropic of Cancer*, upheld by the court below, deprived petitioner of his liberty without due process of law contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States and the provisions of California Penal Code 311 and 311.2 are set forth in Appendix D attached hereto.

Statement of the Case.

(a) In a complaint [C. T. 2] filed in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, petitioner, a bookseller [C. T. 138-139] was charged with a violation of California Penal Code 311.2. It was alleged that on or about October 9, 1961 in the City and County of Los Angeles, the petitioner did knowingly exhibit and distribute "obscene matter, to wit: the book 'Tropic of Cancer,' by Henry Miller." The cause came on for trial before Honorable Kenneth L. Holaday, a Judge of the said Municipal Court, and a jury [C. T. 126, 138].

How Federal Questions Are Presented.

(b) The court below rejected petitioner's argument that "the book 'cannot constitutionally be held obscene' under the code 'in the light of the guarantees' of the United States and California Constitutions" (Appendix A p. 1). The court below held that the trial court had properly instructed the jury on the meaning of obscenity "as determined by the California and United State Supreme Courts" (Appendix A p. 2).

Referring to this Court's opinions in *Times Film Corp., Sunshine Book Co., One, Inc., Kingsley* and *Manual Enterprises, Inc.*, cited by petitioner, the court below held that these decisions "do not support the thesis that independent judicial judgment on review is *required*, although, of course, it may be practiced" (Appendix A p. 4). The court held that the book, under the standards enunciated in *"Roth v. United States (Alberts v. California)* 354 U. S. 476, 1 L. Ed. 2d 1498" (Appendix A p. 5) has not "the slightest tendency to show some social importance" and "lacks anything in the slightest redeeming" (Appendix A p. 6).

The court below held that if the court were to substitute its independent judgment "in favor of the free speech and press guarantee" (Appendix A p. 6), the court would be depriving the People of the right to a jury trial in a criminal case (Appendix A p. 6). The court concluded that petitioner had been properly convicted by the jury "under instructions informing them of the legal standard of obscenity as interpreted by the highest court of our land" (Appendix A p. 7).

The questions of the right of the petitioner to exhibit and distribute *Tropic of Cancer* as guaranteed

by the free speech and press and due process provisions of the First and Fourteenth Amendments and the invalidity of California Penal Code 311.2 under the First and Fourteenth Amendments as construed and applied to the petitioner and the sale of *Tropic*, were detailed in petitioner's Statement on Appeal [C. T. 10-14] to the court below.

The extensive trial was made up largely of testimony of witnesses offered by the People [C. T. 568, 660, 758, 800, 912, 951, 983, 1027, 1996, 2146, 2231, 2251, 2289, 2350, 2425, 2524, 2735], and by petitioner [C. T. 678, 860, 1081, 1108, 1160, 1276, 1304, 1364, 1460, 1589, 1613, 1648, 1725, 1744, 1930, 1940, 1944, 2565, 2683, 2780], with respect to whether or not the book is non-obscene and has redeeming social importance. The question of the right of petitioner to distribute *Tropic of Cancer*, and the protections afforded *Tropic*, under the First and Fourteenth Amendments were raised by various motions, arguments and objections to testimony throughout the trial, *e.g.* [C. T. 144, 145, 516-518, 600-602, 1023-1026, 1730-1736], and by requests for instructions, which were not given [C. T. 61, 62, 64, 65, 67, 68, 73, 74, 85, 88, 89-97, 103-105]. Further details of the federal questions raised at the trial, and record references thereto, are contained in the ensuing discussion in Reasons Relied on for Granting the Writ, *infra*.

(c) The jury returned a verdict of guilty [C. T. 106] The judgment and order of the trial court was probation for a period of one year, the first 30 days of the probationary term to be served in the city jail [C. T. 30]. The appeal to the Appellate Department of the Superior Court of the State of California for

the County of Los Angeles and the denial of transfer by the District Court of Appeal for the Second Appellate District, Division Three[4] followed thereafter as aforestated.

Reasons for Granting the Writ.

1. The primary issue involved in this case is whether the book *Tropic of Cancer* by Henry Miller is entitled to the protections of the First Amendment made applicable to the States by the due process provisions of the Fourteenth Amendment.

The Federal Government has conceded that *Tropic* is constitutionally protected by dropping efforts to prevent its importation into the United States[5] and by lifting the Post Office ban on the book.[6]

The Supreme Judicial Court of Massachusetts, resting its decision "squarely on the First Amendment" decided that *Tropic of Cancer* "cannot constitutionally be held to be obscene" under state law. *Attorney General v. The Book Named "Tropic of Cancer"*, 184 N. E. 2d 328, 335 (1962). The majority concluded that Tropic could not be suppressed because the book has

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[4]In a civil suit for declaratory judgment. Division One of the District Court of Appeal for the Second Appellate District held that *Tropic* is obscene under the state obscenity statute, and upheld the action of a trial court sustaining a demurrer to the complaint. *Zeitlin v. Arnebergh*, 211 A. C. A. 31, 27 Cal. Rptr. 320 (1962).

[5]A copy of the decree of the United States District Court for the Eastern District of New York in *United States v. Three Books, alleged by the Customs Authorities to be obscene, entitled "Tropic of Cancer," "Tropic of Capricorn" and "Plexus,"* dismissing the libel on motion of the United States is attached hereto as Appendix E.

[6]A copy of the story by the New York Times of June 14, 1961, reporting the action taken by the Post Office Department on the advice of the Justice Department is attached hereto as Appendix F.

"serious purpose;" is regarded by a significant segment of the literary world as a book of "literary importance;" the predominant effect and purpose of the book as a whole is "not prurient;" and the writing must be accepted as "a conscious effort to create a work of literary art" and as having "significance." 184 N. E. 2d at 334.

The judgment of the court below is directly in conflict with the aforesaid federal and state constructions of the fundamental law and, it is submitted, with applicable decisions of this Court. The California court decided that the free speech and press guarantees of the United States Constitution are not available to *Tropic of Cancer*, and that criminal sanctions may validly be imposed upon a bookseller for selling the book.

If Tropic of Cancer is not obscene in the constitutional sense there is no valid state power to punish its dissemination. *Smith v. California*, 361 U. S. 147, 152. Mr. Justice Frankfurter, concurring in *Marsh v. Alabama*, 326 U. S. 501, 511, stated: "Where the First Amendment applies, it is a denial of all governmental power in our Federal System." See also, *Alberts v. California*, 354 U. S. 476, 492, fn. 31.

2. It is respectfully submitted that a substantial federal question is here presented. Henry Miller's *Tropic of Cancer* is manifestly a serious work of literature, expresses ideas of social importance, and occupies an important position in twentieth century literature. Since the date of its first publication more than a quarter of a century ago,[7] the book has been praised by quali-

[7]The book was first published in France by the Obelisk Press in 1934. It was published in Prague in 1938. In 1945 and 1947, two separate editions were published in Paris by French pub-

fied critics, writers and scholars. The literary and social importance of *Tropic* has been affirmed by such eminent persons as T. S. Eliot, Norman Cousins, Aldous Huxley, Sir Herbert Read, Harry Ashmore, Eugene Burdick, John Ciardi, Wallace Fowlie, Sir Osbert Sitwell, Philip Rahv, to select only a few distinguished names out of a host of American and world figures.[8]

Tropic of Cancer was the first published work of Henry Miller. Since 1934 he has written over thirty books, and a score of brochures, pamphlets and miscellaneous material. See, *The Henry Miller Reader* (1959), 395-397; Baxter, *Henry Miller, Expatriate* (1961), 191-201.[9]

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lishers. In 1952 a German edition was published; in 1953 a Danish edition. In 1953 and 1954, an English and Japanese edition, respectively, were published in Tokyo. A Swedish edition was published in 1955. Perles, *My Friend Henry Miller* (1956). The edition here involved was published by Grove Press, Inc. in New York in 1961. An Italian edition was published in 1962, and an edition in Hebrew was published the same year in Israel. University of California at Los Angeles, Special Collections, *Henry Miller Collection.*

[8]In Appendix G there are set forth the signatories to a Statement, *Support of the Freedom to Read*, issued after the opinion and ruling of the Hon. Samuel B. Epstein, Chief Judge of the Superior Court of Cook County on February 21, 1962, enjoining local officials from interfering with the sale of the book. *Haiman v. Morris*, No. 615, 19718. The statement and signatures appear in 6 Evergreen Review, July-August, 1962.

[9]Appendix H contains a bibliography of the books written by Miller. There are almost 500 magazines and periodicals from all parts of the world in the Henry Miller Collection in the Special Collections Department of the University of California at Los Angeles Library. [9]This body of commentary on Miller, his life, literary stature and philosophical outlook comes from such diverse areas of the world as Belgium, Brazil, Canada, Cyprus, England, Egypt, France, Finland, Germany, Holland, India, Israel, Italy, Ireland, Japan, Mexico, Norway, Philippines, Poland, Russia, Scotland, Spain, Sweden, Switzerland, Tunisia and the United States. The Library has Miller's correspondence

When Tropic of Cancer was published by Grove Press, Inc. in 1961, the critics and reviewers throughout the country were substantially agreed on the importance of the work, "the first chapter in the 'single, endless, autobiography' that has been his [Miller's] life's work." Maurice Dolbier, *New York Herald Tribune*, June 24, 1961. John Ciardi, The American Poet, observed: "'Tropic of Cancer' must be defended not as an ultimate peak of greatness, but because, whether it succeeds or fails, it is written with power and compassion, and because it is charged in every passage with the author's aesthetic devotion to his form and with his humane devotion of the joy of life. To remove such a book from the experience of mature readers on the grounds that the prurient may use it abusively is an assault upon the aesthetic experience. It is a denial of freedom on the queasy grounds that men are not fit for freedom. It is to say that the least of men shall dictate the diet of the rest." *Saturday Review*, June 30, 1962.[10]

Inquiry at the leading universities of the country reveals that "familiarity with the works of Miller is typically part of the general background of the teacher of modern English." Paul and Schwartz, *Federal Censorship, Obscenity in the Mails* (1961), 128, fn. 2.[11]

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amounting to some 14,000 letters with such figures as Count Keyserling, Ferdinand Leger, J. C. Powys, Wallace Fowlie and many others. See also, Lawrence Durrell—Henry Miller, *A Private Correspondence* (1963).

[10]Appendix I contains excerpts of reviews by Dorothy Parker, *Esquire*, September, 1961; Ben Ray Redman, *Saturday Review*, June 24, 1961; Eric Moon, *Library Journal*, June 18, 1961; Harry T. Moore, *New York Times Book Review*, June 18, 1961; Terry Southern, *The Nation*, November 18, 1961.

[11]See, Richard E. Baxter, *Henry Miller: An Evaluation* (1953), Master of Arts Thesis, Cornell University; Bosley, D. Brotman, *Dionysus, A Critical Interpretation of Henry Miller*

Bibliographies on American Literature include discussions of Miller's writings. Kunitz & Haycroft, *Twentieth Century Authors, A Bibliographical Dictionary of Modern Literature* (1942), 960-961. Library of Congress, *Guide to the Study of the United States of America, Representative Books Reflecting the Development of American Life and Thought* (1960) 131. In 1952, Brewster Ghiselin, Professor of English at the University of Utah, edited an anthology entitled *The Creative Process* in which "thirty-eight of the world's outstanding men and women reveal how they actually begin and complete creative work in such fields as art, literature and science." There are extracts from the writings of Henry Miller, as well as Einstein, Mozart, Van Gogh, Wordsworth, Yeats, James, Wolfe, Jung, Herbert Spencer and others.

Henry Miller is a member of the National Institute of Arts and Letters, an organization incorporated by act of Congress in 1913, dedicated to the furtherance of literature and the fine arts. "Its membership is limited to 250 native or naturalized citizens qualified by notable achievements in art, literature or music." See, *Information Please Almanac* (1963) 220-221, setting forth the complete list of distinguished members, including members of the Academy of Arts and Sciences, an affiliate of the Institute.

3. In assessing the "social importance" of *Tropic of Cancer* by Henry Miller, it is necessary to consider the

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(1951), Master of Arts Thesis, Columbia University; David W. Griffin, *The Possibility of Joy: Henry Miller's Place in the American Tradition* (1951), Master of Arts Thesis, Columbia University. Baxter, *Henry Miller, Expatriate* (1961); University of California at Los Angeles Library, Henry Miller Collection.

literary traditions, the nature and character of the arts, and the philosophy, indeed—the entire environment and setting in America and Europe during the first half of the twentieth century—out of which the writer and the book emerged. Henry Miller was born in New York in 1891. His writing career, begun in the 1920's, was always accompanied by great poverty. It was at the depth of the depression when Miller, virtually penniless, left the United States for Paris, and it was in Paris in 1932 that he began the writing of *Tropic of Cancer*.[12] Taking "the broadest view of the creative process which makes of the artist nothing more than an instrument," Miller himself has stated, "the spirit of the age is the crucible in which, through one means or another, certain vital and mysterious forces seek expression." *Remember to Remember* (1947) 280.

The anxieties and dilemmas that arise in man's quest for identity and for meaning in life are exemplified by the "expatriate" or "exile" in American literary history. A sense of alienation and isolation from their environment in the last half of the Nineteenth Century led Poe, Emily Dickinson, Thoreau and Whitman to become "spiritual" exiles at home. Stephen Crane, Bret Harte and Henry Adams took temporary leave of the country. Henry James, Whistler and Lafcadio Hearn left permanently. The aftermath of World War I brought a post war generation disillusioned with the old material standards of success, conventionality in manners, and the genteel tradition. F. Scott Fitzgerald and Hemingway departed for Europe to "live on

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[12]The original manuscript, many times reworked by the author, was three times the size of the book which was published in Paris in 1934. *The Henry Miller Reader* (1950) 383-385.

a profounder level of experience" and to obtain "a new psychological freedom". Baxter, *Henry Miller, Expatriate* (1961), 4.

The 1930's, a period of economic upheaval and social ferment, found some writers turning to new faiths and movements which made emigration from the homeland less desirable. Others, like Henry Miller, found little meaning in the political or social movements of the day; they belonged to no cult of disenchantment. The expatriate of the 1930's was an isolated figure, searching for fulfillment on his own terms. Man "must fend for himself, and with the aid of his own limited intelligence find his way about an indifferent universe." Becker, *The Heavenly City of the Eighteenth Century Philosophers* (1932) 15.

Moreover, in the early twentieth century, movements in art and literature in Europe had begun to build up the language of the subconscious as the truer expression of the individual. Freud, Jung and Bergson, among others, were emphasizing that an enormously complicated and largely unconscious inner world existed within each individual.[13] Writers like Virginia Woolf and James Joyce stressed that outer reality was a part of the drama of the inner life, that man as a conscious human being is the product of his inner impulses and the external stimuli of the outer world. Humphrey, *Stream of Consciousness in the Modern Novel* (1954) 21-22. For such writers, some kind of pattern in lieu of the familiar "plot" had to be super-

[13]"If a man were to attain his full stature as an individual it would seem that he must acquire some philosophy of life, some view as to the meaning of his own existence. As Jung himself said: 'Man cannot stand a meaningless life.'" Storr, C. J. Jung in *The American Scholar* (Summer 1962) 402.

imposed on the "chaotic materials" of inner states of consciousness. New unities were devised in writing, and complex symbolic structures were created, of which Joyce's *Ulysses* and *Finnegan's Wake* are only two examples.

Emerson, Thoreau and Whitman had emphasized "the self" in their writings, the search for identity through expression. Whitman was determined to "utterly escape and defy the world's attempt to impose upon him this or that conventional identity." Chase, *Walt Whitman Reconsidered* (1955) 51. In the early twentieth century, the typical American artist, in this tradition, sought experience of any kind; experience wrote "its own ticket," carrying the artist to its own chance or casual destination. This was the spirit of Mark Twain in *Huck Finn*, of Sherwood Anderson in *Winesburg, Ohio*, of Henry James in *The Ambassadors*, of the "lost generation" of the twenties who rushed into Paris in order, as Fitzgerald put it, to "experience Paris." Self-liberation through actual and genuine experience was the theme, and the stream of consciousness technique developing in the writings of Dreiser, Farrell, Anderson and Faulkner was the literary device for making the private world public while still maintaining the quality of privacy.

4. *Tropic of Cancer* reflects many of the influences of the traditions discussed above. Miller states that he began his writing career by imitating "every style in the hope of finding the growing secret of how to write." *The Wisdom of the Heart* (1941) 20-21. There is no doubt that he examined the style and technique of every writer whom he admired. See, *The Books in My Life* (1952). But before *Tropic of Can-*

cer all his efforts had been in vain. He states that he failed "because there was no divorce between myself as writer and myself as man." *The Wisdom of the Heart, supra,* 20. Only when he threw "everything overboard" did he begin to hear his "own voice . . . a separate, distinct unique voice." He states: "My life itself became a work of art" *Id.,* 20-21. In his break with America in 1930, and the transferral of his life to Paris, Miller saw himself as a piece of matter detached "from the sun to live as a wholly new creation." He had himself become a "blazing sun," and like all other suns, he had to nourish himself "from within." Stated Miller: "Like it or not I was obliged to create a new life for myself. And this new life I feel is mine, absolutely mine, to use or to smash, as I see fit." Miller, *The Cosmological Eye* (1939) 2.

Thus, *Tropic of Cancer* is the description of an individual in the process of excitedly discovering a cosmology, a view of the universe derived by the individual out of the interpretation of his own experiences[14] It is not surprising that such a book takes the form of a journal, a chronicle of a man's days. Nor is the journal by any means a new literary form; it was well embedded in the European tradition, as, for example, La Rochefoucauld's *Maxims,* Rousseau's *Confessions* and St. Augustine's *Confessions.* All of these writers were concerned with detailing as candidly and

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[14]The importance of such search and discovery in a mass society is exemplified in many writings. See *Identity and Anxiety,* edited by Maurice Stein, Arthur J. Vidich and David M. White (1960); Brinton, *The Fate of Man* (1961); Riesman, *The Lonely Crowd* (1961); Arendt, *The Human Condition* (1958); Erickson, *Childhood and Society* (1950); Fromm, *The Sane Society* (1955).

explicitly as possible the personal experiences of their lives.

To this "journal," this seemingly formless record of impressions, experiences, thoughts and ideas, Miller brings the unity of a developing personality, a vision of his growing cosmology. The book is the description of an individual "consciousness," and Miller creates the unity of a piece of art by employing the stream of consciousness techniques of Joyce and Woolf, and, at one and the same time, the psychoanalytic technique of "free association" in the form of "interior monologues." Thus, by using the first person narrative, Miller will at times in *Tropic* turn off the flow of "the stream" of consciousness, in order by free association to focus on and elaborate one specific idea—and then return to let the stream of consciousness flow again.

5. The journal consists of some 17 episodes of varying lengths, each episode consisting of one, two, or at the most, three incidents. Except for episodes of purely local color, they all consist of a consistent pattern: the recital of an experience or series of experiences, and the ideas and images arising out of these experiences. As the stream of consciousness flows, Miller dams the stream at different times to discuss in terms of word images significant life problems and his philosophic difficulties with respect to them. These include images of death, putrefaction, disease, birth and rebirth, identity and self, the machine, sex, the East, the discrepancy between thought and action. These images and discussions also perform the function of tying the episodes in the book together, as well as acting as breaks in the flow of consciousness; they serve both as literary and psychological devices.

The artistic form of *Tropic of Cancer* is complicated and diffuse. While certain persons including members of the Court below may be able to see little more than "putrid paragraphs" of a "moral derelict" and "social dissenter," the work's important virtues, both ideological and artistic, are evident to many others. In view of this wide conflict, we feel obliged to offer here a somewhat extended analysis of the book's artistic and ideological form.

The first episode is in the form of an introduction because it recapitulates the immediate past and also resembles the train of thought of a man just emerging into consciousness. In a subtle form, we are presented at the outset with a sense of birth: "I have no money, no resources, no hopes. I am the happiest man alive. A year ago, six months ago, I thought that I was an artist. I no longer think about it, I *am*. Everything that was literature has fallen from me. There are no more books to be written, Thank God" [*Tropic of Cancer*, Peo. Ex. 4, C. T. 472-478, p. 1].

The disparity between thought and action has been overcome, Miller asserts. He has found a voice, unencumbered by the stereotypes foisted by the conventions of society upon an artist.

On the other hand, there is death to remember: "We are all alone here and we are dead" (1). Thus the book begins also with loneliness and death, just as it will end in identification with humanity and a vision of life everlasting through that identification (318).

The author's thoughts next jump to images of disillusion, disease and rebirth: "The world around me is dissolving . . . the world is a cancer eating itself . . .

when into the womb of time everything is again withdrawn chaos will be restored and chaos is the score upon which reality is written . . . I am still alive, kicking in your womb, a reality to write upon" (2).

But this rejection and contemplated transfiguration of society, so characteristic of Whitman's writing and American writing in general, is also accompanied with enormous and bubbling egotism: "This then? This is not a book. This is libel, slander, defamation of character. This is not a book in the ordinary sense of the word. No, this is a prolonged insult, a gob of spit in the face of Art, a kick in the pants to God, Man, Destiny, Time, Love, Beauty . . . what you will. I am going to sing for you, . . ." (2).

What emerges from the book's introduction is the idea that Miller is an awakening man, one who is "singing" a song of himself. From that point on, using the stream of consciousness technique, free association, surrealist symbols, Miller moves in all directions searching for an identity, his true self, trying to discover himself outside a stagnating society which includes Europe as well as America. He states that one can "rot" in Europe (49), but he is content to be "a zero" in Paris (150) because it shows that he can live without the disease and corruption of civilization. "I haven't any allegiance, any responsibilities, any hatreds, worries, any prejudices, any passion. I'm neither for nor against. I'm neutral" (153).

His experience with the paintings of the French artist Matisse (162-166) was directly applicable and of deep significance for Miller. He finds a kinship with Matisse. "Behind the minutiae, the chaos, the

mockery of life, he detects the invisible pattern . . . no searching for formulae . . . Even as the world goes smash there is one man who remains at the core, . . . as the process of dissolution quickens" (164).

Then Miller, if stirred by this stream of thought compares the world to the image of a frozen, decaying, broken wheel, concluding by the statement: "At the very hub of this wheel which is falling apart, is Matisse." (165).

These images in turn lead to further musing and "interior monologue." Only through laying bare a disease, only through experience, Miller thinks, can a person perhaps achieve a rebirth of the self. "To fathom the new reality it is first necessary to dismantle the drains, to lay open the gangrened ducts which compose the genito-urinary system that supplies the excreta of art . . . The drains are clogged with strangled embryos" (165).

Thus it is that the moments of greatest self-insight come in the midst of peculiarly passionless and degrading scenes in brothels. Prior images and memories seem to pour out when the "hub of the wheel" is reached, and at these moments all that occurred previously seems to become an organic unity as the narrator approaches self-understanding at a higher level. "A glance at that dark, unstitched wound and a deep fissure in my brain opens up: all the images and memories that had been laboriously or absent-mindedly assorted, labeled, documented, filed, sealed and stamped break forth pell-mell like ants pouring out of a crack in the sidewalk; the world ceases to revolve, time stops, the very nexus of my dreams is broken and dissolved and my

guts spill out in a grand schizophrenic rush, an evacuation that leaves me face to face wtih the absolute" (246-247).

The world of the 1930's seems passionless, cold, material. It can no longer be patched up or repaired. Even at the lowest depths, all is cancerous. There appears to be no escape from the "self" imposed by society (246-252).

But there is for Miller suddenly a glimpse of something affirmative, a meaning to life which has undoubted currency today. The highest aim of man should not be to be "human," that is, to belong to "men and governments" (254). "Today I am proud to say that I am inhuman, that I belong not to men and governments, that I have nothing to do with creeds and principles . . . I belong to the earth! . . . [with] the race of artists who, goaded by unknown impulses, take the lifeless mass of humanity and by the fever and ferment with which they involve it turn this soggy dough into bread and the bread into wine and the wine into song . . . If I am inhuman it is because my world has slopped over its human bounds . . . It may be that we are doomed, . . . but if that is so then let us set up a last agonizing, bloodcurdling howl, a screech of defiance, a war whoop! . . . Let us living ones dance about the rim of the crater, a last expiring dance. But a dance!" (254-257).

Tropic of Cancer is a "journal" only. The book does not end the record of Miller's search; it simply "leaves off." Thus, Miller follows episodes of deepest insight and affirmation, with such final episodes as the Dijon employment as a teacher. Here is an episode, devoid of the joy of the preceding passages. Its predominant images are cold; the seas are filled with waste and

rotting effluvia. There is nothing but disillusion in the strait-jacket role of teacher which society has imposed upon him. His interior monologues are those of despair. "You drift around like that for years and years, until you find yourself in the dead center, and there you slowly rot, slowly crumble to pieces, get dispersed again. Only your name remains" (287).

So the chronicle comes to a close, as if Miller is reluctant to leave the reader with any intervening illusion which will prevent the reader from standing face to face with reality. Yet the very last page of the book finds Miller reiterating the dominant theme of his journal: Unity with the "flowing" part of Mankind, the need for "space," for elbow room in order to find one's real self. "The sun is setting. I feel this river flowing through me—its past, its ancient soil, the changing climate. The hills gently girdle it about; its course is fixed" (318).

Thus Miller leaves the reader with a consciousness of "self". The struggle is not yet over for Miller or the reader, because there is as yet no statement of purpose, only a beginning of self-understanding. Miller himself described *Tropic of Cancer* as "a blood-soaked testament revealing the ravages of my struggle in the womb of death." *The World of Sex* (1959) 17-18. Yet the book essentially is a synthesis by Miller of a persistent American literary tradition and experience with contemporary European philosophy to create a new and optimistic image of twentieth century man. It is an image which Miller strove to obtain by self-liberation, by commitment to a personal identity—regardless of society's particular conventions, definitions and demands.

6. In the recently issued, *The Great Ideas Today*, 1962, a continuation of *Great Books of the Western World*, coedited by Robert M. Hutchins and Mortimer J. Adler and published by Encyclopedia Britannica, Inc., one of America's most respected literary critics, Alfred Kazin, in the section of the book on literature (115-161), devotes a portion of his discussion to Henry Miller's *Tropic of Cancer* (146-148). Mr. Kazin states that the real significance of Miller's novel lies in "its frank dismissal of the given world, the supposed moral order of the world. For Miller the world is essentially an hallucination, and the hungry, desperate man who roams the streets of Paris in *Tropic of Cancer* is concerned to reinstate the proper version of things, by a surrealistic displacement of what we think is real. So much emphasis is placed on the self, the author as the hero of his own narrative, because a powerful new act of consciousness is required of him. . . . This is the basis on which Miller sings a new 'song of myself' in the Whitman tradition . . . *Tropic of Cancer* is a maddening but rewarding book. Although the narrative is confusing in its destination, you can pick up the book at any point and read it with pleasure. As Whitman does on a higher plane, Miller makes the world seem freshser, gayer, crazier, less responsible . . . He really sees life with the desperate humor of the man totally down on his luck, who at the same time has kept the wild hope of the American romantic that the world can yet be transformed."[15]

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[15]Recognition of the social importance of Miller's writings, including *Tropic of Cancer*, has grown since the 1930's. There has been a growing perception that Miller's writing has an organic unity, that his work demonstrates a sense of devotion and dedication to self in the service of humanity, to a set of artistic and

Robert Kirsch, the Literary Editor of the Los Angeles Times, asserted at the trial that *Tropic of Cancer* has social importance because "it is a work which comes in the tradition of the autobiography and the confession . . . Miller through this work initiated and inaugurated an approach to fictional autobiography . . . it had tremendous effect on American writers and on English writers" [C. T. 1375-1376]. The book has social value "as a document, reporting life in a certain time and in a certain place . . . it tells us what the vision was of one man in one place at a certain time" [C. T. 1376]. ". . . the statement which Miller makes throughout this book explicitly and implicitly of his criticism of the mores and morals and ideals of the society from which he came" has important redeeming social value [C. T. 1377].

Professor Charles Kaplan, Chairman of the Division of Language and Literature at San Fernando State Col-

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personal ideals arising from a particular constellation of talents and compulsions. West, *Mind on the Wing* (1947) 120; Glicksburg, *Henry Miller: Individualism in Extremis*, 33 Southwest Review 290 (1948); Orwell, *Inside the Whale*, a collection of essays (1940), 177-178; Maine, *Henry Miller: Bigotry's Whipping Boy*, 7 Arizona Quarterly 207 (1951); Durrell, *Studies in Genius*, 20 Horizon 46, 56 (1949). Almost all critics have defended Miller's use of explicit language as essential to his writing as honest, artistically necessary, realistic and valuable. Fowlie, *Shadow of Doom: An Essay on Henry Miller*, Accent (Autumn 1944); Krim, *The Netherworld of Henry Miller*, The Commonweal (October 24, 1952); Muller, *The World of Henry Miller*, 2 Kenyon Review (1940); Huxley, *Death and the Baroque*, Harper's (April 1949). The serious purpose and intent of *Tropic* appears in a letter written by Henry Miller to counsel for petitioner in answer to an inquiry by counsel as to how Miller views the controversy about *Tropic* more than two decades after its publication. Attached hereto as Appendix J is a copy of the letter.

lege stated below: "I think it has social importance in the same sense that the general doctrine of individuality has importance for the American citizen. It reminds him occasionally that he does not have to be a victim of the machine of a mass society, that he is an individual, that he is entitled to his individual thoughts, his individual beliefs, his individual opinions. This is an extremely affirmative book, it seems to me, enabling the individual to say what he feels has to be said. This does not mean that we have to agree with him but, at least, it affirms the right of the individual to be heard in his own terms [C. T. 1467].

Finally, Dr. Abraham Kaplan, noted professor of philosophy at the University of California at Los Angeles, stated that *Tropic of Cancer* has social importance because of Miller's "unwavering honesty . . . [the book] reflects the anguish that many people have felt and that all of us have felt to some degree or other, as to what meaning we can find in our existence . . . Make[s] us realize what a really tough problem we all have . . . trying to find a foundation for our lives, trying to find some meaning in it, some value, some kind of purpose . . . enormously important for the society to be able to face these views, to see them expressed so as to be able to understand them. And if we repudiate them, to be able to arrive at a rational foundation for repudiating them . . . So I am not now taking a position on each of a dozen different topics that Henry Miller touches on; . . . the primary question in my mind is not whether I find that attitude an objectionable one but whether it is socially important in our society to be able to face even an objectionable point of view" [C. T. 2694-2698].

7. It is submitted, in the light of the aforesaid, that *Tropic of Cancer* is a genuine work of literature which expresses ideas, and has an important position in the history and development of literature. It is the work of a talented and serious artist expressing his view of life. It is also the work of a man who in the 1930's almost broke himself in body and spirit to escape a life which to him seemed a humiliating compromise. The author's "blood-soaked testament" is a searing reminder of the dangers implicit in a society which submerges individuals and deprives them of their essential dignity.

This Court has held that a writing is entitled to the full protection of the First Amendment and cannot be suppressed as obscene unless it is "utterly without redeeming social importance." *Alberts v. California*, 354 U. S. 476, 484. It has been held that the essential characteristic of liberties of speech and press is "that under their shield many types of life, character, opinion and belief can develop u nolested and unobstructed." *Cantwell v. Connecticut*, 310 U. S. 296, 310. Plainly "a community may not suppress . . . the dissemination of views because they are unpopular, annoying or distasteful." *Murdock v. Pennsylvania*, 319 U. S. 105, 116. "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance." *Martin v. Struthers*, 319 U. S. 141, 143.

The importance to an open society of freedom of expression has been increasingly stressed. "Free discussion of the problems of society is a cardinal principle of

Americanism" (*Pennekamp v. Florida*, 328 U. S. 331, 346); the right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that set us apart from totalitarian regimes." *Terminiello v. City of Chicago*, 337 U. S. 1, 4.

Literature and the arts are protected by the First Amendment because they have great social importance. Lockhart and McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 368-373 (1954). The function of literature is to interpret, criticize, innovate, mirror, intensify, clarify and experiment. Lerner and Mimms, *Literature*, IX Cyc of Soc. Sci. (1931); 5 Social Meaning of Legal Concepts (1953), 34, 36.[16] "Literature and the arts must be protected by the First Amendment. They lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created." Meiklejohn, *The First Amendment is an Absolute* in The Supreme Court Review (1961), 245, 257, 262-263.

It is respectfully submitted that freedom of expression in art and literature under the First Amendment assumes that each adult in a democratic society must be permitted to find "his own proper diet."[17] Literature contains ideas which challenge and stimulate people to think, and each person must be free to read any portrayal of the human scene which he may think deserves scrutiny. "From the multitude of competing offerings the

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[16]See also, Trilling, *The Meaning of a Literary Idea* in Aesthetics Today, edited by Philipson (1961) 213; Wilson, *Axel's Castle* (1931) 2.

[17]Barzun, *The Arts, The Snobs, and the Democrat* in Aesthetics Today, edited by Philipson (1961) 19.

public will pick and choose." *Hannegan v. Esquire*, 327 U. S. 146, 158. The societal interest in freedom of expression is that men will be free to develop their faculties; that men will be free from "irrational fears"[18] whenever conventions are questioned. *Tropic of Cancer* must be entitled to the protection of the First Amendment if the "free dissemination of ideas" is not to be the loser. *Smith v. California*, 361 U. S. 147, 151.

8. The trial court held, over objection, that the California obscenity statute should be construed as removing the protection of the First Amendment from any writing which the *average person in Los Angeles* deems "utterly without redeeming social importance." The trial court stated that the determination of whether or not *Tropic* has *social importance* "would have to be based upon the common conscience of the community, that is the average person in the community" [C. T. 516]. The jury was instructed to this effect [C. T. 2822-2823]. Throughout the trial, the "experts" were restricted to testifying whether or not in their opinion *Tropic* had any social importance to the "average person" in the local community.[19]

The court below upheld the rulings and instructions of the trial court (Appendix A). The court below held that the jury had "impliedly found" that the book was "utterly without redeeming social importance," a finding allegedly supported by the evidence, and like

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[18]Mr. Justice Brandeis in *Whitney v. California*, 274 U. S. 357, 376.

[19]The record on this issue is abundantly clear. C. T. 516-518, 601-602, 946, 1023-1026, 1051-1052, 1198-1199, 1378-1379, 1500-1501, 1971-1972, 1976-1977, 2019, 2022-2032, 2034-2040, 2262-2265, 2434-2444, 2494-2497, 2536-2538, 2637-2638, 2750-2753, 2803-2808.

any other "issue of fact," not to be disturbed on appeal (Appendix A p. 2). "We believe that juries are composed of average persons" (*Id.* p. 3). The Court further stated that to disturb the verdict of the jury that the book was utterly without redeeming social importance would nullify "the People's right of trial by jury" (*Id.* p. 7), stated the court below, and require the court to substitute its own "independent judgment in favor of the free speech and press guarantee, which we do not" (*Id.* p. 6).

It is respectfully submitted that the application of the standards enunciated by the courts below would reduce art and literature to levels acceptable only to "those of the average or majority of the populace." Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 114 (1960). To permit the punishment of a bookseller on the theory that the *social importance* of a book is to be determined only by what the "average person" in the community believes, and to instruct the jury that they must determine the social importance of a writing by the "common conscience of the community" is to condemn creative, probing minds to an officially disciplined uniformity "for which history indicates a disappointing and disastrous end." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 637. The national tradition is to the contrary.[20] This Court has

[20]Mill, *On Liberty* (Great Books ed.); Milton, *Areopagitica* (Great Books ed.) 389-391, 397-399; Madison, *Report on the Virginia Resolutions in Elliott's Debates* (1907 ed.) 569-571; Jefferson, *A Bill for Establishing Religious Freedom*, II Works of Thomas Jefferson (Fed. ed.) 438-441; Chafee, *Free Speech in the United States* (1941) 33; Commager, *Freedom Loyalty Dissent* (1954) 14-15.

stated that the basic guarantee of the First Amendment "is not confined to the expression of ideas that are conventional or shared by a majority." *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684, 689. The observation of Judge Augustus Hand in *United States v. One Book Entitled Ulysses*, 72 F. 2d 705, 708 (2 Cir. 1934) should be recalled: "The foolish judgments of Lord Eldon about one hundred years ago, proscribing the works of Byron and Southey, and the finding by the jury under a charge by Lord Denman that the publication of Shelley's 'Queen Mab' was an indictable offense are a warning to all who have to determine the limits of the field within which authors may exercise themselves."[21]

9. A constitutional infirmity was also engendered by the action of the courts below in restricting proof at the trial as aforesaid to the limits of candor in the Los Angeles community.[22] Clearly the standards for judging

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[21]The trial court refused to instruct that the words "redeeming social importance" include, among other things, the literary or artistic value or merit of the book; include the theological, sociological, educational, or other social values of the writing; that offensiveness to the sensibilities of an individual, or even a substantial segment of the community was not sufficient to condemn the book; that the free speech provisions of the First Amendment permit wide varieties of taste and reject official norms; that the guarantees of the Constitution are not confined to the expression of ideas that are conventional or shared by a majority, and other instructions of a like character. C. T. 62, 64, 65, 74, 90-102, 103. See also, Perelman, *If It Please Your Honor*, The New Yorker, April 28, 1962, pp. 37-38.

[22]C. T. 513-518, 601-602, 665-668, 673-675, 994-996, 1500-1501, 1730-1737, 1990-1991, 2262-2267, 2294-2299, 2494-2497, 2717-2719, 2742-2745. California has 58 counties, of which Los Angeles is only one. There are approximately 400 urban unincorporated and incorporated communities with populations of 2,500 or more in the State. Los Angeles County has only 73 incorporated cities and 85 unincorporated towns. World Almanac (1962) 259-261; California Roster (1961) 253-258. Petitioner

obscenity were intended to achieve a general and predictable national policy on obscenity, free of local or temporary distortions. As to the degree of public acceptance of a writing, a country-wide approach would appear to be unavoidable. See, Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 108-114 (1960); A.L.I. *Model Penal Code*, §207.10(2) (Tent. Draft No. 6, 1957) 44-45.

Such a construction of the law by the courts below leads to the "balkanization" of freedom of expression in the country, permitting hundreds and thousands of local subdivisions to engraft their different standards upon the nation's literature and art and all media of communication; such a "crazy quilt" construction deprives an obscenity statute of any meaningful criteria of guilt; the inevitable tendency of such vague and ambiguous law is to diminish the circulation of the press and to reduce the reading of books of general circulation dealing with sex to the level of reading of the most censorious local community; it results in the citizens of one part of the country enjoying the right to read literature denied capriciously to citizens of another part of the country and it subverts the functions of appellate courts, required to measure the extent of freedoms of speech and press under First Amendment standards, by intruding conflicting standards imposed by a local community. *Smith v. California*, 361 U. S. 147, 152-154; *Marcus v. Search Warrants of Property, etc.*, 367 U. S.

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requested the trial court to charge the jury "that in applying contemporary community standards to the book, you are not restricted to the City of Los Angeles nor even to the Los Angeles Metropolitian area." The instruction was refused. C. T. 61.

717, 730-731; *Butler v. Michigan*, 352 U. S. 380, 383; Lockhart and McClure, *Censorship of Obscenity*, 45 Minn. L. Rev. 5, 112 (1960).

10. Measured by constitutional standards, there is a complete absence of evidence in the record to establish that *Tropic of Cancer* appeals to the prurient interest or goes substantially beyond limits of candor in the description of sex in literature.[23] The predominant appeal of *Tropic* is to a literary and intellectual interest. As the book and its commentators make clear, the "objectionable" words and scenes in *Tropic* are part of the working out of a valid literary endeavor; they are relevant to the dominant theme and necessary to communicate that theme. See, Lockhart and McClure, *Censorship of Obscenity*, 45 Minn. L. Rev. at 91-92 (1960). See also, *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433, 437-439 (2 Cir. 1960) affirming 175 F. Supp. 488, 501-502 (S. D. N. Y. 1959).

Tropic of Cancer, published by Grove Press, Inc. in 1961 was distributed with decorous advertising devoted solely to its literary merit.

It is respectfully submitted that *Tropic of Cancer* cannot be held obscene in the constitutional sense. *Alberts v. California*, 354 U. S. 476; *Times Film Corp. v. City of Chicago*, 355 U. S. 35; *Sunshine Book Co. v. Sum-*

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[23]The uncontradicted testimony shows that petitioner honestly believed that the book had ideas of social importance, that the writing was not utterly without redeeming social importance, and was therefore not obscene under the law. C. T. 230-231, 392, 397, 402, 1081-1083, 1751-1768, 1775-1781, 1790-1812, 1814-1818, 1819-1907, 1907-1923, 1923-1927. The trial court declined to give proposed instructions by petitioner on this issue. C. T. 63, 77, 78. Compare, *Smith v. California*, 361 U. S. 147.

merfield, 355 U. S. 372; *One, Inc. v. Olesen*, 355 U. S. 371; *Mounce v. United States*, 355 U. S. 180; *Manual Enterprises, Inc. v. Day*, 370 U. S. 478. See also, *United States v. One Book Entitled Ulysses*, 72 F. 2d 705 (2 Cir. 1934), affirming 5 F. Supp. 182 (D. C. N. Y. 1933); *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433 (2 Cir. 1960), affirming 175 F. Supp. 488 (D. C. N. Y. 1959); *United States v. Keller*, 259 F. 2d 54 (3 Cir. 1958).

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted and the judgment of the court below reversed.

STANLEY FLEISHMAN,
Counsel for Petitioner.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Memorandum Opinion and Judgment.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Bradley Reed Smith, Defendant and Appellant. Superior Court No. CR A 5113, Trial Court No. 151588.

Appeal by defendant from judgment and order granting probation, of the Municipal Court of the Los Angeles Judicial District, Kenneth L. Holaday, Judge. Appeal from judgment dismissed; order granting probation affirmed.

For Appellant — Brock and Fleishman by Stanley Fleishman.

Amicus Curiae in Support of Appellant — A. L. Wirin, Fred Okrand and Nathan L. Schoichet.

For Respondent — Roger Arnebergh, City Attorney, Philip E. Grey, Assistant City Attorney, Edward P. George, Deputy City Attorney.

Appellant was found guilty by a jury in the Municipal Court of the Los Angeles Judicial District of violation of P. C. § 311.2, by reason of his exhibiting and distributing of obscene matter, the book, "Tropic of Cancer," and probation was granted by that court.

Appellant argues here that the book "cannot constitutionally be held obscene" under the code "in the light of the guarantees" of the United States and California Constitutions, and that the jury verdict never answers the question of constitutionality, or whether the book was "utterly without redeeming social importance" with-

in the definition of P. C. § 311 (a). Of course, the jury makes no specific finding of constitutionality, but th trial court had instructed the jury in the language of the code and the meaning of obscenity as determined by the California and United States Supreme Courts, in which we find no error. It is presumed, in the absence of any showing to the contrary, that the jury followed the law as to which it was instructed. Thus the jury impliedly found that the book was "utterly without redeeming social importance", a finding amply supported by respondent's expert witnesses. With this finding we must agree, since, as we stated in *People v. Harris* (1961), 192 Cal. App. 2d Supp. 887, 894; "We hold that, if the contents of the book could not support an implied finding that it is obscene, the question is for the court, but if it could support such a finding, the question is for the jury as in any other case where there is an issue of fact." In *Roth v. United States* (1957) 354 U. S. 476, 490, 1 L. ed. 2d 1498, 1510, as we pointed out in *People v. Harris, supra*, p. 894, the Supreme Court approved an instruction informing the jurors that they were "the exclusive judges of what the common conscience of the community is. . . ."

The recent case, *People v. Williamson* (1962), 207 A. C. A. 885, 888, held that '. . . whether a particular book is obscene is primarily one of fact," relying on *Roth-Alberts* which approved the definition of obscenity stated in *People v. Wepplo* (1947), 78 Cal. App. 2d Supp. 959, 961. The Supreme Court of California in *In re Harris* (1961), 56 Cal. 2d 879, 880, stated: "The standard for judging obscenity adequate to withstand the charge of constitutional infirmity is whether *to the average person* [emphasis ours], apply-

ing contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. [Citations.]" *People v. Williamson, supra*, quotes that standard verbatim, then upholds the giving of an instruction employing the almost exact wording of the definition of obscenity contained in P. C. § 311 (a). We believe that juries are composed of average persons.

Appellant argues that the Legislature made as an integral part of the definition of obscenity, that the matter be utterly without redeeming social importance (appellant at p. 12 opening brief uses the word "value," which is not the same as the word "importance" employed by the Legislature), and thus has made it the obligation of every judge and appellate court before whom the constitutional issue is raised, to make an independent review of the matter to determine whether the matter can be found "constitutionally" to be obscene. He cites numerous United States Supreme Court decisions to "the requirement of independent judgment." A review of those cited shows: *Times Film Corp. v. City of Chicago* (1957) 355 U. S. 35, 2 L. ed. 2d 72; *Sunshine Book Co. v. Summerfield* (1958) 355 U. S. 372, 2 L. ed. 2d 352; *One, Inc. v. Oleson* (1958) 355 U. S. 371, 2 L. ed 2d 352 (all per curiam opinions merely citing the *Roth* case); *Kingsley Corp. v. Regents of Univ. of N. Y.* (1959) 360 U. S. 684, 3 L. ed. 2d 1512, (concurring opinion of Justice Harlan, concurred in by Justices Frankfurter and Whittaker at 3 L. ed. 2d 1524, wherein those Justices were referring, at p. 1526, not to a trial court's finding but to three of seven New York State Justices' opinion, 151 N. E. 2d at 200, and to the scope of the applicable

New York law, and stated: "The opinion . . . ., as . . . with §§ 122 and 122-a themselves when independently read in their entirety, . . ." and at p. 1527 of 3 L. ed. 2d, Justice Harlan said: ". . . I have viewed this film"); *Manual Enterprises, Inc. v. Day* ..... U. S. ....., 8 L. ed. 2d 639, in which the justices could not agree on an opinion, concerning a ruling by the Postmaster's Department, barring certain magazines from the U.S. mails, under a Federal statute; Justices Harlan and Stewart made an independent review of the proscribed magazines (id. p. 648); it does not clearly appear that the other Justices did so. Those cases do not support the thesis that independent judicial judgment on review is *required*, although, of course, it may be practiced. The other cases cited by appellant from federal courts inferior to the Supreme Court or from the courts of other states are at most merely persuasive and not binding on our court.

Moreover, the book here in question has been read by this court, unlike the U. S. Supreme Court, except for Justice Harlan, in the *Roth* case, (1957) 354 U. S. 476, 1 L. ed. 2d 1498, 1509, 1514. From that reading, we regard the book, as a whole, as an autobiographical abortive attempt at literature by an American self-expatriate in Paris, separated from his wife who sends him money at times, from whom he is mentally, spiritually and physically divorced, indulging in adulterous relationships with Paris street women and others,

whom he frankly and appropriately terms "whores", as well as other barrack-room four-letter words; his chief obsession, interest and necessity (waking or sleeping, drunk or sober) is food, drink and sexual acts or conversation about the same; the slimy flow of his attraction to excrement expressed in a four-letter word and thoughts thereof runs like a sewer through his printed work; the putrid paragraphs and pages of pornography pervade the book. Though some pages present the author's thoughts and ideas, at times cleverly written, describing his selfincrimination as a moral derelict and social dissenter, belonging "not to men and governments"; but even these pages are often intersticed with the putrescence and slime of his mental sewer, his lewdness and lascivity with which he is constantly preoccupied. The entire book is obscene, to the average person, applying contemporary standards, and is predominantly an appeal "to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance", as defined in P. C. § 311 (a). Eighteen expert witnesses of stature thought so and so testified; the jury thought and found so, so do we. We hold, as did the jury, that the book is obscene and utterly without redeeming social importance. Although *Roth v. United States* (*Alberts v. California*), 354 U.S. 476, 1 L. ed. 2d 1498, states that "ideas having even the slightest redeeming social importance . . . have

the full protection of the guaranties . . .", we must consider the language of the court, immediately following the above: ("unless excludable because they encroach upon the limited area of more important interests." (p. 484 U. S., 1507 L. ed. 2d) We hold, not only, that the book has not the slightest tendency to show some social importance, but also that it lacks anything in the slightest *redeeming*. In our opinion the protective interest of the state in the morality of its citizens, would be encroached upon should we hold otherwise. Further, were we to substitute our independent judgment in favor of the free speech and press guarantee, which we do not, it would be to fly in the face of the California Constitution, Art. 1, section 7, reading: "The right of trial by jury shall be *secured to all*, and remain inviolate. . . ." (Emphasis ours.)

"Under the constitution of this state the same right is guaranteed to the people as to the defendant to have a jury ultimately pass upon *the fact* of guilt or innocence." (Emphasis ours.) *People v. Stoll* (1904) 143 Cal. 689, 696. "In a criminal action the sovereign has the same right to have the truth of its accusation against the defendant determined by a *trial court* to the same extent and in the same degree as has the accused. (*People v. Stoll*, 143 Cal. 689, 696. . . .)" (Emphasis ours.) *People v. Wisecarver* (1944) 67 Cal. App. 2d 203, 209, quoted in *People v. Misner* (1955) 134 Cal. App. 2d 377, 380-1. See also 29 Cal. Jur. 2d pp. 475-482; 497-500.

We are of the opinion that where substantial evidence supports the implied findings of the jury, an appellate court, not only is not required to but should not in effect set aside the factual determination by a jury that the book was obscene and that the appellant violated our penal provisions making obscenity a misdemeanor. To do so would encroach upon and destroy the People's right of trial by jury, secured to them by our Constitution, which thereby should "remain inviolate". That right would nullify the finding by the jury that the book in fact was obscene, viewed by them as to every explicit facet of the code definition, contained in one complete sentence.

We believe that the jury's finding of obscenity should be accorded at least as great, if not more constitutional weight, than that of a writer's right to imprint or disseminate through a bookstore, his depraved and degrading filthy words and obscene utterances and lewd depictions of salacious episodes of sexual scenes and mental images or than that of a bookstore proprietor to exhibit and distribute such demoralizing obscene writings. This issue is not the right of any person to read such writings, but the right of appellant to sell, exhibit or distribute them when they have been found obscene, in violation of a constitutional state statute, by a jury whose finding is supported by very substantial evidence, under instructions informing them of the legal standard of obscenity as interpreted by the highest court of our land.

The appeal from the judgment is dismissed, there being no judgment. The order granting probation is affirmed.

Dated Oct. 24, 1962.

HULS,
Judge.

I concur:

SWAIN
Presiding Judge

I concur. The purpose of this memorandum is not to limit or qualify the main opinion but to present an additional basis for affirmance. In my opinion the judgment may be affirmed even though our own examination of the book may disclose that substantial portions of the book have much social importance. Solely to illustrate the distinction I wish to make, let us consider the example of an author who writes something which even the most hardened purveyor of pornography would concede was obscene and who publishes it within the covers of a book which also contains some well-recognized literary classic, admittedly not obscene and having great social importance. Because they are two separate unconnected writings, we are sure all would concede that the latter could not redeem the former and the "book" could be banned. I believe there is only a difference in degree between that and a situation where there is added to a legitimate literary work certain obscene passages, not for the purpose of enhancing the literary passages but for the purpose of

appealing to the nonliterary audience interested only in such smut, in order to sell books to them. Of course in determining whether the criticized portions are indeed obscene, they must be considered with and as part of the entire novel, and if so considered as a whole the matter is not obscene then there is no violation of law. But if so considered they are not a legitimate part of the literary work but are added islands of smut (to use a different but more accurate four letter word than perhaps the author might have used), then such obscenities are without anything to "redeem" them and, within the meaning of the statute and cases, are "utterly without redeeming social importance." I am not saying that all such material here is unnecessary to the development of the ideas the author is trying to convey. Some portions of it may be entirely proper. I am saying that the jury was justified in finding as a matter of fact that the author went too far, and we would not be justified in holding as a matter of law that the book is not obscene.

SMITH
Judge

APPENDIX B.

Order Certifying Cause to District Court of Appeal.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Bradley Reed Smith, Defendant and Appellant. Superior Court No. CR A 5113. Trial Court No. 151588.

This action is hereby certified on our own motion to the District Court of Appeal. The judgment and opinion of this court was filed October 24, 1962. It affirmed an order granting probation made after defendant was found guilty of exhibiting, distributing, offering to distribute and having in his possession with intent to distribute, obscene matter, to-wit, the book "Tropic of Cancer", in violation of P.C. § 311.2. This court held that the book was obscene within the meaning of P.C. § 311 (a).

The following important questions of law should be settled:

1. Is the book "Tropic of Cancer" obscene?

2. If the book has literary merit does that alone give it redeeming social importance which takes it out of the class of being obscene?

Dated October 24, 1962.

By the court.

SWAIN
Presiding Judge

HULS
Judge

SMITH
Judge

APPENDIX C.

Order Denying Transfer on Certification.

In the District Court of Appeal of the State of California, Second Appellate District, Division Three.

The People of the State of California, Plaintiff and Respondent, v. Bradley Reed Smith, Defendant and Appellant. 2nd Crim No. 8607. Superior Court No. Cr A-5113. Trial Court No. 151-588.

Filed Nov. 15, 1962.

The Court:

The record on transfer in the above-entitled case having been filed in this court on October 31, 1962, pursuant to certification by the Superior Court of the County of Los Angeles, and this court having considered the matter of whether such case should be transferred to this court for hearing and decision, it is hereby ordered that such transfer be, and it hereby is, denied.

Dated this 15th day of November, 1962.

FILES, J. would grant the transfer.

APPENDIX D.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. California Penal Code, §311 provides:

> "As used in this chapter:
>
> "(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.
>
> "(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any

picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

4. California Penal Code, §311.2 provides:

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

APPENDIX E.

Decree Dismissing Libel.

United States District Court, Eastern District of New York, United States of America. Libellant, against, Three Books, Alleged by the Customs Authorities to be Obscene, Entitled "Tropic of Cancer," "Tropic of Capricorn" and "Plexus".

Filed Aug. 15, 1961.

ORDER

On April 28, 1961, a libel of information was filed herein by libellant, United States of America, praying attachment, condemnation and forfeiture of the above-entitled article.

On April 28, 1961, a monition was duly issued out of and under the seal of this court returnable May 24, 1961 directing the United States Marshal to attach said article.

On May 24, 1961, the United States Marshal made his return on said monition that the above-entitled article had been attached, notice given and publication made; and, furthermore, on said date, proclamation was made and there were no appearances.

On May 24, 1961 Ephraim London, Esq., on behalf of one Dorothy Upham, obtained extension of time to appear and file a claim of owner and make answer to the libel herein.

Thereafter, time was further extended to Dorothy Upham to appear, file a claim of owner and answer herein up to and including the tenth day following the date on which the United States Court of Appeals for the Second Circuit rendered a decision in a com-

panion action relating to the above-entitled article and such time has not expired.

The libellant, United States of America, now seeks to dismiss its libel herein and discontinue this proceeding.

NOW THEREFORE, upon consent of the United States of America and Dorothy Upham, as evidenced below, it is

ORDERED, ADJUDGED AND DECREED that the above-entitled action is dismissed; and it is further

ORDERED, ADJUDGED AND DECREED that the United States Marshal release and deliver the above-captioned article to the possession of Dorothy Upham or her legal representative.

Dated: Brooklyn, New York
August 15, 1961

JACOB MISHLER
U. S. D. J.

The foregoing order is hereby consented to:

JOSEPH P. HOEY,
United States Attorney
Eastern District of New York
Proctor for Libellant
271 Washington Street
Brooklyn 1, New York
By MALVERN HILL, JR.,
Assistant U. S. Attorney

EPHRAIM S. LONDON
Proctor for Dorothy Upham
1 East 44th Street
New York 17, New York
By JORDAN DERWIN

APPENDIX F.

New York Times—6-14-61

"Tropic of Cancer" Scores a Victory.

Special to The New York Times

WASHINGTON, June 13—The Post Office abandoned its move today to bar Henry Miller's "Tropic of Cancer" from the mails as obscene.

Officials termed this a tactical step. They explained that suits testing whether the novel was obscene by legal definition were pending, and that it would be wise to await their outcome.

However, it was learned that the Justice Department had advised the Post Office to drop the case for another reason—that it was likely to lose in the courts.

Justice Department lawyers warned that the novel, however explicit it was about sexual matters, was recognized by many critics as having literary merit. That fact, they said, would make it difficult to sustain any postal ban in the courts.

Two suits are in New York. They arose from an attempt by Mrs. Dorothy Upham, a New York artist, to import a Paris edition of the book.

APPENDIX G.

Statement in Support of the Freedom to Read and Signatures Thereto.

We, the undersigned, strongly endorse Judge Samuel B. Epstein's defense of the freedom to read in his historic decision in the *Tropic of Cancer* case in Chicago. Judge Epstein, by stating that the "right to free utterance becomes a useless privilege when the freedom to read is restricted or denied," has put the issue of police censorship squarely before the public. In recent months, policemen, encouraged by certain minority pressure groups, have succeeded in forcing their own narrow-minded literary tastes upon many communities.

We believe with Judge Epstein that neither the police nor the courts should be allowed to dictate the reading matter of a free people. The issue is not whether *Tropic of Cancer* is a masterpiece of American literature; rather, it is whether an author of Henry Miller's artistic integrity is entitled to the protections afforded by the Constitution of the United States.

This is an issue of immediate and serious concern to every citizen who holds dear the traditions of our democracy, and who abhors the intrusion of official censorship into the vital area of artistic and literary expression. It is an issue to which we are especially sensitive.

Judge Epstein's ruling against book banning has reaffirmed the right of a free people to decide for itself what it may or may not read. Beyond that, it sounds a clear warning to all of us to guard the principles upon which our country was built.

We urge all who, along with Judge Epstein, rese police censorship in the area of literature and the ar to make their voices heard in their own commun ties and to defeat any attempts at repression befo they are allowed to erode our most precious freedom

Herbert M. Alexander
Pocket Books, Inc.

Gay Wilson Allen

Aaron Asher
Meridian Books, Inc.

Harry Ashmore
Encyclopedia Britannica

Herbert S. Bailey, Jr.
Princeton University Press

F. Sherman Baker
St. Martin's Press, Inc.

James Baldwin
Betty Ballantine
Ballantine Books, Inc.

Ian Ballantine
Ballantine Books, Inc.

William Barrett

Sheila Barry
Taplinger Publishing Co., Inc.

Jacques Barzun
Howard K. Bauernfeind
J. B. Lippincott Co.

Saul Bellow
Eric Bentley
Paul Bixler
Antioch Review

Louise Bogan
Charles G. Bolte
The Viking Press, Inc.

Edward E. Booher
McGraw-Hill Book Co.

Keith Botsford
The Noble Savage

Walter I. Bradbury
Harper & Brothers

Ned Bradford
Little, Brown & Co.

George Braziller
George Braziller, Inc.

Germaine Bree
Harvey Breit
John Malcolm Brinnin
George P. Brockway
W. W. Norton & Co., Inc.

Donald W. Brown
Penguin Books, Inc.

Eugene Burdick
Charles R. Byrne
Macfadden-Bartell Corp.

Herb Caen
San Francisco Chronicle

Erskine Caldwell
Angus Cameron
Alfred A. Knopf, Inc.

Truman Capote
Mark Carroll
Harvard University Press

John Ciardi
Ross Clairborne
Dell Publishing Co., Inc.

Harold Clurman
Arthur A. Cohen
Holt, Rinehart & Winston, Inc.

Evan S. Connell
Contact

John Cournos
Pascal Covici
The Viking Press, Inc.

Thomas A. Dardis
Berkley Publishing Corp.

Edward Darling
Beacon Press

Peter H. Davison
Atlantic Montly Press

Edward DeGrazia
Edward C. Delafield, Jr.
Crown Publishers

Patrick Dennis
John Dos Passos
Grant Dugdale
The World Publishing Co.

James W. Ellison
Holt, Rinehart & Winston, Inc.

Richard Ellmann
Jason Epstein
Random House

John Ervin, Jr.
University of Minnesota Press

Clifton Fadiman
John Farrar
Farrar, Straus & Cudahy, Inc.

Lawrence Ferlinghetti
City Lights Books

Philip S. Foner
Citadel Press

Jerome Fried
The World Publishing Co.

John G. Fuller
Saturday Review

Bernard Geis
Bernard Geis Associates

Maxwell Geismar
Jack Geller
Emanuel Geltman
Horizon Press, Inc.

Arnold Gingrich
Esquire

K. S. Giniger
Hawthorne Books, Inc.

Herbert Gold
Harry Golden
John L. Goldwater
Belmont Books

Mitchell Goodman
Horizon Press, Inc.

Robert Gottlieb
Simon & Schuster, Inc.

Louis C. Greene
R. R. Bowker Co.

Howard Greenfeld
The Orion Press, Inc.

Horace Gregory
John Howard Griffin
Richard L. Grossman
Simon & Schuster, Inc.

William B. Harvey
New York University Press

A. L. Hart, Jr.
The Macmillan Co.

Hiram Haydn
Atheneum Publishers

Hugh M. Hefner
Playboy

Charles A. S. Heinle
Chilton Co., Book Division

Joseph Heller
Lillian Hellman
Cecil Hemley
The Noonday Press

John Hersey
Henry B. Hibbard
Barnes & Noble, Inc.

Granville Hicks
Lawrence Hill
Hill & Wang, Inc.

William Hogan
San Francisco Chronicle

Tay Hohoff
J. B. Lippincott Co.

John Clellon Holmes
Sidney Hook
Irving Howe
Dissent

B. W. Huebsch
The Viking Press, Inc.

Richard Huett
Dell Publishing Co., Inc.

J. Lawrence Hughes
William Morrow & Co., Inc.

Aldous Huxley
Harold E. Ingle
The Johns Hopkins Press

Sidney R. Jacobs
Alfred A. Knopf, Inc.

James M. Jacobson
Pocket Books, Inc.

James Jones
Fred Jordan
Grove Press, Inc.

Mackinlay Kantor
Jeremiah Kaplan
The Crowell-Collier Publishing Co.

Alfred Kazin
Jack Kerouac
Chester Kerr
Yale University Press

Robert Kirsch
Los Angeles Times

Donald S. Klopfer
Random House

Conrad Knickerbocker
Kansas City Star

Kenneth Koch
Herman Kogan
Chicago Sun-Times

Louis Kronenberger
Eric Larrabee
American Heritage

James Laughlin
New Directions

John T. Lawrence
William Morrow & Co., Inc.

Seymour Lawrence
Atlantic Monthly Press

Max Lerner
Freeman Lewis
Pocket Books, Inc.

R. W. B. Lewis
Denver Lindley
The Viking Press, Inc.

Robert Lowell
Storer B. Lunt
W. W. Norton & Co., Inc.

Kenneth McCormick
Doubleday & Co., Inc.

Carson McCullers
Robert M. MacGregor
New Directions

Carey McWilliams
The Nation

Robie Macauley
Kenyon Review

Ian Mackenzie
St. Martin's Press, Inc.

Norman Mailer
Bernard Malamud
Marya Mannes
Daniel Melcher
R. R. Bowker Co.

Frederic G. Melcher
R. R. Bowker Co.

Thorpe Menn
Kansas City Star

Daniel Mich
Look

Arthur Miller
M. Hughes Miller
The Bobbs-Merrill Co., Inc.

Gilbert Millstein
New York Times

Eric Moon
Library Journal

Marianne Moore
Frederick Morgan
Hudson Review

Alice Morris
Harper's Bazaar

Truman Nelson
Hoke Norris
Chicago Sun-Times

Theodore O'Leary
Kansas City Star

Hyung Woong Pak
Chicago Review

Norman Holmes Pearson
Arthur Pell
Liveright Publishing Corp.

Bernard B. Perry
Indiana University Press

Robert Phelps
George Braziller, Inc.

William Phillips
Partisan Review

Samuel H. Post
Belmont Books

Lawrence Clarke Powell
Ben Raeburn
Horizon Press, Inc.

Henry Rago
Poetry

Kennett L. Rawson
David McKay Co., Inc.

Theodor Reik
Elmer Rice
Anders Richter
University of Chicago Press

Harold Robbins
Henry Robbins
Alfred A. Knopf, Inc.

Paul H. Rohmann
Antioch Review

Barney Rosset
Grove Press, Inc.

Philip Roth
William H. Ryan
Angel Island Publications

Howard W. Sams
The Bobbs-Merrill Co., Inc.

Mark Schorer
Webster Schott
Kansas City Star

M. Lincoln Schuster
Simon & Schuster, Inc.

Lew Schwartz
Abelard-Schuman, Ltd.

Peter Schwell
Simon & Schuster, Inc.

William R. Scott
William R. Scott, Inc.

Edwin Seaver
George Braziller, Inc.

Richard Seaver
Grove Press, Inc.

Leon E. Seltzer
Stanford University Press

Rod Serling
Karl Shapiro
Leonard Shatzkin
The Crowell-Collier Publishing Co.

Irwin Shaw
William L. Shirer
James H. Silberman
The Dial Press, Inc.

Henry W. Simon
Simon & Schuster, Inc.

Morris Sorkin
Citadel Press

George Stevens
J. B. Lippincott Co.

Irving Stone
Harold Strauss
Alfred A. Knopf, Inc.

Lyle Stuart
Lyle Stuart

William Styron
Aaron Sussman
Sussman & Sugar, Inc.

Alan Swallow
Alan Swallow, Publisher

Richard Taplinger
Taplinger Publishing Co., Inc.

Frank Taylor
The Racine Press

Evan W. Thomas
Harper & Brothers

Lionel Trilling
Mark Van Doren
Dan Wakefield
Arthur W. Wang
Hill & Wang

Robert Penn Warren
Edwin Watkins
University of Michigan Press

Howard Sayre Weaver
Yale University Press

Richard Wilbur
John C. Willey
William Morrow & Co., Inc.

Edmund Wilson
Thomas J. Wilson
Harvard University Press

Donald Wollheim
Ace Books, Inc.

W. A. Wood
University of Chicago Press

Philip Wylie
Thomas Yoseloff
Thomas Yoseloff, Inc.

Marya Zaturenska

APPENDIX H.

Bibliography of Books Written by Henry Miller.

Tropic of Cancer, Obelisk Press, Paris, 1934;

Aller Retour New York (Siana Series No. 1); Obelisk Press, Paris, 1935;

Black Spring; Obelisk Press, Paris, 1936;

Max and the White Phagocytes; Obelisk Press, Paris, 1938;

Tropic of Capricorn; Obelisk Press, Paris, 1939;

Hamlet (with Michael Fraenkel), Vol. 1 (complete); Carrefour, Paris-New York, 1943, Vol. 2; Carrefour, Paris-N.Y., 1941;

The Cosmological Eye, New Directions, N.Y., 1939;

The World of Sex; Olympia Press, Paris, 1959;

The Colossus of Maroussi; The Colt Press, San Francisco, 1941;

The Wisdom of the Heart, New Directions, N.Y., 1944;

Sunday After the War; New Directions, N.Y., 1941;

The Air Conditioned Nightmare; New Directions, N.Y., 1945;

Maurizius Forever; The Colt Press, San Francisco, 1946;

Remember to Remember, New Directions, N.Y., 1947;

The Smile at the Foot of the Ladder; Duell, Sloan & Pearce, N.Y., 1948;

Sexus, 2 vols. (Book One of The Rosy Crucifixion); Obelisk Press, Paris, 1949;

The Books in My Life, New Directions, N.Y., 1952;

Plexus, 2 vols. (Book Two of the Rosy Crucifixion), The Olympia Press, Paris, 1953;

The Time of the Assassins; New Directions, N.Y., 1956;

Nights of Love and Laughter; New American Library of World Literature, N.Y., 1955;

Big Sur and the Oranges of Hieronymous Bosch; New Directions, N.Y., 1956;

A Devil in Paradise; Signet Pocket Book, New American Library, N.Y., 1956;

Quiet Days in Clichy; The Olympis Press, Paris, 1956;

The World of Sex (revised edition); The Olympia Press, Paris, 1957;

The Red Notebook; Jargon Books, Highlands, N.C., 1958;

Reunion in Barcelona; The Scorpion Press, Northwood, England, 1959;

The Intimate Henry Miller; Signet Pocket Books, New American Library, N.Y., 1959;

Nexus, Vol. 1; The Olympia Press, Paris, 1959;

Stand Still Like the Hummingbird; New Directions, Norfolk, Conn., 1962;

Henry Miller, watercolors, drawings, and essay, The Angel is my Watermark, Harry N. Abrams, New York, 1962.

APPENDIX I.

Review of Tropic of Cancer.

DOROTHY PARKER—"Esquire" September, 1961:

"Henry Miller's 'Tropic of Cancer', now obtainable in the United States, was written in Paris in 1934; ever since it has been banned in English-speaking countries. I am as opposed to the banning of a book, any book, as I am to capital punishment; one seems to be as brutishly stupid as the other, and as ineffectual. The suppression of 'Tropic of Cancer' I find peculiarly idiotic. The book contains, of course, all the short, ugly words that probably roused the fuss. But they are honest words, to be used with respect for their force; thrown, as they are by their hundreds, on the pages of 'Tropic of Cancer' they become cold and tedious as autumn rain; tedium is not obscenity. There are many and many blow-by-blow descriptions of the sexual act, but there are few if any variations on the old, old theme—nothing whatever to make a reader rush forth and try out novelties. Life on the Left Bank, as here depicted, is crammed with discomforts, from cold and hunger to invasion by tiny monsters; cockroaches stride across the floors and march arrogantly over the pillows of those that have pillows, and lovers exchange lice and nits; nothing whatever, is there to cause a man to throw down his job, abandon his immaculate wife and fragrant little ones, and streak for *la belle France*. 'Tropic of Cancer' may not be the one book that you would want to have with you on a desert island, but it is certainly no incitement to lechery * * *."

* * * * *

BEN RAY REDMAN—*"Saturday Review", June 24, 1961:*

* * * * *

"Seldom has a book come to us laden with such praise. Mr. Shapiro, who calls Miller 'the greatest living author', once thought it would be a fruitful idea to put 'a bible of Miller's work . . . in every hotel room in America, after removing the Gideon Bibles and placing them in the laundry chutes.' Ezra Pound, T. S. Eliot, George Orwell, and Edmund Wilson have saluted 'Cancer' as a modern classic. Horace Gregory thinks of it as 'Huck Finn in Paris'—an original and provocative conception. John Ciardi writes that 'there can be no doubt that "Tropic of Cancer" is a substantial work of art'. Harry T. Moore finds it 'a healthy book, not an unclean one'. Sir Herbert Read proclaims it to be 'one of the most significant contributions to the literature of our time.'* * *

"As for the famous four-letter words, they are taboo—when they are—only because of convention indefensible by reason. 'Ordure' and 'copulate', for example, have exactly the same meanings as their more common equivalents, and evoke the same mental images. What are being objected to, then, are mere sounds. A foolish business, one might think; but of late the areas of objection have, of course, been shrinking rapidly.

"It should be added that once a taboo word emerges into general usage it loses its potency. We now refer to a woman's 'leg', instead of her 'limb', with no feeling of verbal daring.

"Perhaps Mr. Shapiro is right in calling Miller the greatest living author, but this can be proved

or disproved only with time. Certainly he is one of the most remarkable, most truly original authors of this or any age. He is a word-master whose range, so far as I know, is unique in breadth and depth. All the ugliness and much of the beauty of the world, all the evil and much of the good, lie within his understanding and expressive grasp. Miller can be astonishing, enchanting, and revolting.

* * *

"Women, most of them prostitutes, throng 'Tropic of Cancer.' Miller and his pals lust after them daily, and perform feats of satyriasis; but in their thoughts and talk a woman is seldom a 'woman'—she is a four-letter name for a portion of her anatomy.

"Filth and fornication, however, fill only a portion of Miller's world. He can write like an angel or like a hog in a reeking pen, but never like a man who has compromised with either life or art. His descriptions of Paris—its streets, squares, houses, public buildings, brothels, cheap hotels, slums and dives, its air and sunlight, and its river that flows through the city 'like a great artery running through the human body'—are matchless. His words on art and artists, the United States, the lockstep of conformity, Matisse, Dostoevsky, Joyce, Proust, mankind's future, and a score of other topics, keep the reader's mind alert with their challenges.

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"Readers who find 'Tropic of Cancer' emetic—as Judge Wollsey found 'Ulysses'—and who thrust

it from them, will miss much; but there is no reason to sneer at them. The only censorship that can work in this field is self-censorship, and surely it is permissible. But any public censor who touches this book will touch living tissues—much of it disgusting, much of it beautiful."

ERIC MOON, Editor *"Library Journal", June 18, 1961:*

"This book will present many librarians—public librarians particularly—with a test of conscience and courage in book selection. Outside the U. S. (and Britain), Miller is generally regarded as one of the major contemporary American writers. With Joyce and Lawrence, he has been a major influence in extending the frontiers of the modern novel, and he has gone much further into enemy territory than either of the other two. 'Tropic of Cancer', perhaps slightly the cooler of Miller's two 'Tropics', has been kept from the American public with great vigilance on the part of customs officials for 27 years, ever since its first publication in Paris in 1934. Now that it has broken this barrier, it seems certain that it will become the No. 1 target for those bands of self-appointed censors who roam the country in search of four-letter words and in defense of adolescent morals. The book is one part of a never-ending fictional autobiography—Miller really never writes anything else. The Miller eye view of Parisian life in the 20's and early 30's is raw in its passions, its bitterness, its language. It is the lusty, uninhibited song of a man completely happy without illusions. It has humor, anger, art, and sex to saturation

point. But the sex is not the smirking sex of the Westchester bedroom sagas which have dominated the American novel in the last two decades. Miller writes about sex as he writes about everything, the beautiful or the degraded, as an artist and a man who enjoys *all* that goes to make up life and living. Karl Shapiro, in a good Introduction, claims that Miller is the greatest living author. This is an overstatement, perhaps intended to balance the scales a little. It is certain, however, that Miller is an important and influential author. In any library where creative literature means something, it is hard to accept that Grace Metalious might reach the shelves, and Henry Miller not. But it will happen."

HARRY T. MOORE—*"The New York Times Book Review", June 18, 1961:*

"Since 'Tropic of Cancer' first appeared in Paris as a paperback twenty-seven years ago, it has been smuggled into English-speaking countries which turn their Customs inspectors into censors. The high praise of such writers as T. S. Eliot, George Orwell, Edmund Wilson and Herbert Read made it contraband of uncommon quality. Now the book has at last become available in the author's native country.

"It was Henry Miller's first published volume, and it is as good as anything he has turned out since. It glows with the joy of discovery: I can write! Its engaging first-person narrative, the monologue of a man who draws people to him, tells the story of an American expatriate—not a Henry James gentleman in a Place Vendome Ho-

tel, but rather a Left Bank vagabond merrily sponging on his friends. Like him, they are members of the international, semi-literary, Parisian-tenement set, and they enjoy having him around.

"All of them, particularly the narrator, have frequent erotic adventures with every type of woman from the local *poulès* to rich American widows. Every bit of this is set down graphically, with precise physical details and Old English locutions employed both descriptively and conversationally. Yet, with cinematic abruptness, the narrative often switches from amatory scenes to lyric evocations of the *faubourg* soft in the dusk or the river streaked with lights. The style throughout is plain, though always energetic and vivid, with split-angled Braquelike images rising from the hard texture of American speech.

"* * *

* * * * *

TERRY SOUTHERN—*"The Nation", November 18, 1961:*

"Miller's work is in the tradition of Whitman, Wolfe and Sandburg, the only tradition which has so far proved indigenous to the culture; it is, of course, the tradition of *romantic agony*. Romantic agony, in the classic Baudelairean form from which it derives, may be likened to the manic-depressive syndrome in psychology; it is characterized, in its effect, by spontaneity and it contains both the lustiest affirmation of life and the most severe denial of it. In its American species it has never, before Miller, been full-blooded—the negative has always been edited out of it, either after or before leaving the author's desk; * * *

"No one who has read Henry Miller's early work, or who pretends to any information about the history of creative forms, can doubt his absolute formative influence on this aspect of the contemporary scheme. For unpredictable spontaneity and emotional range, for pure uncompromisingly schizoid integrity in self-revelation, this work—as represented by *Tropic of Cancer*, and much of it written as long as twenty-five years ago—remains without peer.

"* * *

"The over-all accomplishment of Miller's work is immeasurable. The fact that language itself has presented a problem peculiar to American literature is a fairly well-known phenomenon, though it does not always appear to be fully understood. The peculiarity of this problem is to be found in the singular circumstance that English is the only Western language which contains words of high-frequency usage—i.e., the so-called 'four-letter words'—which are, of themselves, inadmissible in certain forms of converse and in all literary forms of mass media. * * *

"One of the crucial problems, then, in American literary creation has been how to avoid the use of these words with the minimum loss of verisimilitude in dialogue, and without too seriously crippling the chance, in narrative, for meaningful self-expression. Artists have deplored these arbitrarily imposed limits as nothing less than primitive superstition, and giants, of course, have ignored them. Certainly there is no doubt as to where the bulk of credit must go for the progress so

far in overthrowing this tyranny of words. And this alone assures Miller a very high place indeed in our literary history, but it is not all. * * *

"America has produced a fair amount of literature to receive international acclaim; certainly there is no dearth of American Nobel Prize-winners. What is *rare*, however, and quite possibly unique, is for a culture to have at its bosom an artist whose major work has not merely gone unpublished in his own country, but has actually been outlawed there . . . work, that is to say, hailed throughout the rest of the world as one of the very first importance, and by an author more widely read, according to the University of California librarian, Lawrence Powell, than any American living, other than Upton Sinclair; or any dead other than Mark Twain and Jack London. Yet it is just within the past year that the public has been allowed to taste of its past and future heritage. With *Tropic of Cancer* accounted for, this leaves only *Tropic of Capricorn, The World of Sex, Black Spring, Quiet Days in Clichy, Sexus, Plexus* and at least one other volume of *The Rosy Crucifixion*—or a total of several thousand pages —still on the dark side of the horizon."

* * * * *

APPENDIX J.

Letter of Henry Miller.

Big Sur, California
Dec. 26th, 1962

Stanley Fleishman, Esq.,
1680 Vine Street—Suite 700,
Hollywood (28) California.

Dear Stanley:

At your suggestion I am setting down some of my views concerning the *Tropic of Cancer* case, which I understand is on its way to the highest court of the land.

Tropic of Cancer was begun in Paris, not Brooklyn, when I was in my fortieth year. I had already been married twice and was the father of a child. I had begun writing almost ten years before, with no success whatsoever. I left New York, my birthplace, in the early part of 1930, determined to begin life anew. In 1928, due to a freak of fortune, my wife and I traveled about in Europe several months. The impressions received during this trip abroad convinced me that if I were to continue my career as writer Europe was a better place for me to do it than America. Somehow I did not fit into the American scheme of things. From the time I graduated from High School until I decided to become a writer I must have had a hundred different jobs. I quit the last one—employment manager of the messenger department of the Western Union Telegraph Co.—resolved never to look for a job again but to live or die as a writer. That was in September 1924. *Tropic of Cancer* was published in Paris in September 1934. During this ten year period I had

written three books and any number of short stories and articles. To the best of my knowledge only two or three of the latter—none of the books—were ever published. You can imagine that it was in something like a state of desperation that I resolved to try my luck abroad.

I had imagined on leaving America that I was going to Spain, but I never got farther than Paris. I arrived there in the Spring of 1930, knowing nothing of the French language. While writing the *Tropic of Cancer* I was obliged to live by my wits, as the book sets forth. The difficulties I had experienced in pursuing the career of writer prior to leaving America were considerably augmented, to put it mildly, on arriving in France. Looking back on it all I must confess, however, that it was more enriching and instructive starving in Paris than in my home town. Thanks to the aid and encouragement of the friends I made—largely expatriates like myself—I managed to survive and finish the book. It was something of a miracle that I found there in Paris the one publisher in all the world courageous enough to sponsor such a book: Jack Kahane of the Obelisk Press. Between the time he accepted the book and its publication I rewrote the book three times.

I have often referred to this work as an ice-breaker. In writing it I found my own voice, liberation, in short. This was due, undoubtedly, to the life I led, by which I mean not only the struggles and hardships of keeping alive in a foreign land but also as a result of a growing acquaintance with French literature, the French way of life, and the acceptance accorded me by French writers. Unwittingly I found myself living

that "bohemian" life which so many celebrated writers and artists before me had been obliged to live for one reason or another. My book might be regarded, I suppose, as a celebration of that splendidly miserable kind of life. In writing it, I ought to add, I had almost no hope of its ever being accepted by a publisher. It was something I had to do in order to preserve my own integrity. It was a case of do or die. Certainly the last thing I ever dreamed of was that it would one day be published in my own country.

Perhaps it is not a "pleasant" book. It has proved, however, to be an "instructive" one—for those who know how to read it. Of that I have had much interesting testimony during the years following its publication. In the files of the library at U.C.L.A. are thousands of letters from readers of the book all over the world. The burden of most of these testimonials is that the book had a liberating effect, that it inspired hope and courage, the courage to live one's own life, come what may. It had this effect, I presume, because it is a naked, vivid account of one man's struggles with almost insuperable odds, because it is a revelatory account of this man's life, sparing nothing. Many of these readers confessed that it was the first time in all their reading experience that the whole man had been portrayed. They saluted the author as one who had restored a new kind of integrity to literature, to *our* literature, at least.

The truth of these assertions I myself discovered later when I began to investigate the emasculative process which Anglo-Saxon literature has undergone these last few hundred years. With the tremendous upheavals which the second world war brought about it became

more than ever obvious to me, and others, that our literature was not rendering a true picture of the known behavior, sexual behavior particularly, of the citizens of the Western world. Some measure of freedom had been gained perhaps, though this is not always clear, but certainly not freedom of expression in literature.

Perhaps my book would have died a normal death had it not been discovered and touted by the American and British troops stationed abroad during and after the war. I am thinking here not only of the forces in Europe, but in Asia and Africa also. (In China alone, I have been told, over 100,000 copies—pirated editions— were sold.) With the end of the war the book went into a number of translations, including French, German, Czech, Swedish, Danish, Spanish, Portuguese, Japanese, Dutch, Finnish, Hebrew, Italian. In the countries where the book has been permitted to be sold and distributed openly it has been read and accepted by the public at large, not simply by cliques and cultists, as was the case in America during the years it was banned here. I have never heard, incidentally, that the reading of the book brought about a general demoralization or an increase in crimes of a sexual nature. In all these countries, moreover, the foremost critics of the land usually hailed the work as an important contribution to literature. In my own country, because of this book and others of like nature which followed, I was elected to membership in the National Academy of Arts & Letters. This before the ban on these books had been abolished.

Certainly this book has provoked attention and discussion wherever it has been published. In every country there are those who believe that the author went

too far, that certain things may be said but not written and so on. The intensity of these discussions varies with the habits and traditions of the citizens of the various countries. Back in 1953, when I was asked to appear before the Juge d'Instruction in Paris in connection with the book *Sexus,* the judge finally asked me if I believed in complete freedom of expression. And I answered Yes. I cannot imagine a writer sitting down and saying to himself: "I think I will permit myself to say this but not that." I know, of course, that there are plenty of writers who endeavor to cater to the public's taste and who, in so doing, have an eye on the market. These men I do not regard as writers. A serious, dedicated writer is in my opinion, a man who stands behind every word he puts down and who does not impose restrictions on himself for fear of incurring public disfavor. He writes because he has the urge, because he can do no other. True, in every period there are only a few such individuals, but it is my belief that it is only these few who contribute anything of value to literature, who nourish the love of letters.

In my youth my idols, among American authors, were such as Thoreau, Emerson, Walt Whitman; they still are, I should add. I regard them as revolutionary spirits, men who were against the trend of the times. Perhaps I was drawn to such writers because I am myself a born rebel. To-day, my birthday, I am seventy one years old—and still a rebel. A rebel who has learned, as St. Francis of Assisi put it, "not to try to change the world, but to change worlds."

To come back to the free spirits . . . If they had been obliged to write down to the level of the "normal

community standard", as the phrase runs, would we have to-day the works which made them famous? Why should any thinker, in any field, be required to make his thoughts palatable and acceptable to the ordinary citizen? As a member of a great community which boasts of the exceptional freedom its citizens are permitted to enjoy, it seems to me that this question is not out of place. Years ago, when reading a work of Wassermann's called *The Maurizius Case,* I copied out a long passage from the mouth of one of his characters. It began something like this . . . "When I utter the word Europe I think of . . ." and here he proceeds to name the illustrious guiding spirits which laid the foundation of our civilization: poets, novelists, artists, thinkers, scientists, philosophers, religious leaders and so on. An exciting list, truly, since it embraced all those who made the Europe which has influenced us and the world. Reading this roster one cannot but be impressed with the number of leading spirits who, in giving of their best, were maligned, slandered, persecuted, imprisoned, tortured, executed, burned at the stake, anathematized. It would almost seem as if those who fought and died to insure our freedom, especially freedom of thought, were looked upon not only as enemies of society but as monsters.

The question in my mind is not how far one should be permitted to go in expressing oneself freely but how great is the gap, and how dangerous for the future of mankind, between the daring inspired by conviction and integrity and the conformity based upon inertia, stupidity, cowardice and hypocrisy? Are we here on earth to live like sheep, live in the herd, or to follow our own bent, our own conscience? Should we be fear-

ful of revolutionary thinking or welcome it? Should we act as our fathers and forefathers or as free and individually unique beings? And finally, is freedom itself to be interpreted and circumscribed by the few, the many, or by each man for himself?

Much has been said, during the course of the many trials which this book has provoked, of the danger to society, particularly to the young, which free circulation of the book involves. No one, to my knowledge, has yet pointed out a single instance where such has been the effect. And the book has had so far well over a million readers. We do know, on the other hand, the disastrous effects upon adults as well as young people of drugs, tobacco, alcoholic beverages, weapons, even automobiles. Is it possible that we can adapt to certain hazards and not others? Are certain words and expressions, even though commonly used, not to be employed in writing? Do they really constitute such a dangerous menace? Or is it not simply a matter of overcoming one more built in prejudice? We all know that when it comes to the classics a liberal use of what is called obscenity may be found. On what presumption is the freedom to read the classics permitted? Is time the test? If so, what hope is there of obtaining new classics?

I use the word classics deliberately. I regard *Tropic of Cancer* as such, a classic. Despite all that has been said against it, despite all the efforts to suppress it, it continues to make its way, to find more and more readers. It is now almost thirty years since its first publication, in Paris. It is still in its infancy, one might say. Previous suppression of its sale, in this country, did not prevent its being read. In my travels

about the country I have found copies which were smuggled in ten and twenty years ago in the homes of the most eminent and respectable people, including judges and ministers of the gospel. Moreover, should its sale in this country now be forbidden, those who still wish to have copies have only to write to publishers and booksellers abroad. Moreover, restriction of sale or of distribution does not of itself kill a book; on the contrary, evidence shows that such procedure only whets people's appetite. This being so, I fail to grasp the logic which animates those who wish to impede its sale.

As to its sale . . . I have been accused at times of having written it expressly to make money, that is to say, of having purposely used objectionable language in order to make appeal to certain readers and thus further its sale. Nothing, of course, could be further from the truth. I have never written anything expressly to make money. I have been relatively poor, for many years desperately poor, until the last few years. When the book was published in Paris my publisher neglected to obtain an American copyright, because it never occurred to him that it might one day be published in this country. One could hardly say that "we" conspired to bring out a book which twenty or thirty years later would become a best seller in the United States. (At the moment of writing this I am informed that a reputable English publisher will now attempt to bring the book out in England, which is the last barrier in the free world.)

I trust that it is apparent from the foregoing that I am not attempting to present myself as the author of a nice, clean, wholesome piece of work. I think of

this work as a sincere, honest effort which, in liberating me as a person and a writer, has somehow done the same for many others. I make no attempt to evaluate it as literature, since that is the task of posterity. But I feel certain that it is a work which will live no matter what is said or done about it. And even if I am "in the tradition", as most Europeans agree, I do not regard myself as a "monster" but as a sane and useful member of society. I have found life worth living, even when unbearably difficult, and I think this view of life permeates not only the book in question but all my work.

Sincerely,

/s/ Henry Miller

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 972

BRADLEY R. SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

On Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California in Support of Petition.

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SUBJECT INDEX

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I.

Certiorari should be granted because of the importance of the question involved. The case transcends the fact that a state appellate court has sustained a criminal conviction of a bookseller for selling a book. The case presents outright the question whether under the First Amendment the shameful history of book banning can be permitted to be repeated as to a book which has achieved acclaim, both in this country and worldwide, as a work of high literary merit 2

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IN THE

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OCTOBER TERM, 1962

No. .....

BRADLEY R. SMITH,

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vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Brief Amicus Curiae of the American Civil Liberties Union of Southern California in Support of Petition.

This brief is filed with the consent of both parties pursuant to Rule 42(1) of this Court. The written consents are being forwarded to the Clerk of this Court concurrently herewith.

Interest of Amicus Curiae.

The American Civil Liberties Union of Southern California is a non-profit membership corporation dedicated to the preservation of, *inter alia*, the constitutional right to freedom of expression and due process of law. It believes that freedom of expression is indispensable under our constitutional system. It believes that the suppression of the book, Tropic of Cancer, as has been done here by criminally prosecuting and convicting a bookseller who, along with other books of all kinds, offers the book for sale to those members of the public

who desire to read it, violates fundamental rights guaranteed by the First and Fourteenth Amendments of the United States Constitution.

This is not the first time the ACLU has contended that the book cannot constitutionally be suppressed. More than a decade ago, then by the Northern California affiliate, and prior to this Court's clarification of the law in *Roth v. United States*, 354 U. S. 476, it was so contended (*United States v. Two Obscene Books*, 99 F. Supp. 760 [N. D. Cal. 1951], affd. sub. nom. *Besig v. United States*, 208 F. 2d 142 [C. A. 9 1953]).[1]

Hence this brief.

I.

Certiorari Should Be Granted Because of the Importance of the Question Involved. The Case Transcends the Fact That a State Appellate Court Has Sustained a Criminal Conviction of a Bookseller for Selling a Book. The Case Presents Outright the Question Whether Under the First Amendment the Shameful History of Book Banning Can Be Permitted to Be Repeated as to a Book Which Has Achieved Acclaim, Both in This Country and Worldwide, as a Work of High Literary Merit.

The dismal chronicle of writings which have been banned over the years[2] attests to the need for this

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[1]Since those cases, the United States has reversed the position it there took and has agreed through both the Customs Service (*United States v. Three Books*, Civ. No. 610685, U. S. D. C. E. D. N.Y., consent order of Aug. 15, 1961) and the Post Office Department (N.Y. Times, June 14, 1961) that the book is not obscene and cannot be denied entry into the country nor transmission through the mails.

[2]From Homer to Dante, to Galileo, to John Milton, to Jonathan

Court to grant the petition herein to make clear that under the First Amendment and under *Roth v. United States*, 354 U. S. 476, it cannot be permitted for the censor's ax to fell serious works of literary merit.

In *Roth*, this Court, admonishing that "the door barring federal and state intrusion into this area (of free speech and press) . . . (may be) opened only the slightest crack," (354 U. S. at 488) held that "(a)ll ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties." (354 U. S. at 484). It is for this reason that it held obscenity not to be protected by the First Amendment, for "obscenity (is) utterly without redeeming social importance." (*ibid.*). Conversely, however, this also makes clear that a work cannot constitutionally be held to be obscene if it is not utterly without redeeming social importance. That is to say, if a work has *some* redeeming social importance, it cannot, in the very nature of things and according to the plain meaning of the English language, be utterly without redeeming social importance. Or, put another way: "utterly" means "utterly", and "utterly without" means precisely that.

This is clear not only as a matter of the definition of words,[3] but is likewise the meaning which the courts

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Swift and to Thomas Paine; to Goethe, Shelley and Heinrich Heine; to Charles Darwin and Harriet Beecher Stowe; to Walt Whitman, Flaubert and Ibsen; to Emile Zola, Anatole France and de Maupassant; to Theodore Driser, Upton Sinclair and James Joyce; to Eugene O'Neill, Aldous Huxley and William Faulkner. (See "Banned Books" by Ann Lyon Haight [R. R. Bowker Co., 2d Ed., 1955].)

[3]Webster's Third New International Dictionary defines utterly as "in an utter manner: to an absolute or extreme degree: to the full extent: absolutely, altogether, entirely, fully, thoroughly,

have given to the words "utter" or "utterly" when they have had occasion to construe those words when used in a statute or contract (*The Delaware Mutual Safety Insurance Company v. Gossler*, 96 U. S. 645, 24 L. Ed. 863, 866-868; *Insurance Company of Pennsylvania v. Duval* (Pa.), 8 Serg & R. 138, 148; *Moody v. Moody*, 118 Me. 454, 456, 108 Atl. 849; *Stewart v. Stewart*, 78 Me. 548, 552, 7 Atl. 473; *Pearsall v. Chapin*, 44 Pa. St. 9, 14, 8 Wright 9, 14).

It is submitted, therefore, that with the place "Tropic of Cancer" has made for itself as a work of serious literature, it simply cannot be held that "Tropic" is "absolutely", "altogether", "entirely", "fully", "totally", "completely" without redeeming social importance; to do so would defy all logic as well as law. Accordingly, the court below, in allowing suppression of the book, has permitted transgression against that most sensitive of constitutional rights: the public's right to read (*Cf. Smith v. California*, 361 U. S. 147, 154).

We understand that the question of the right of Tropic of Cancer to live has resulted in some 60 different litigations throughout the country.[4] This in it-

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totally". Black's Law Dictionary, 4th Edition, does not contain a definition of the adverb, utterly, but defines the adjective, utter, as "entire, complete, absolute, total".

[4]Among these are: *Attorney General v. The Book Named "Tropic of Cancer"*, ... Mass. ...., 184 N. E. 2d 328; *Haiman v. Morris*, No. 61 S. 19718, Superior Court, Cook County, Illinois; *People v. Pershina*, No. 16644, Municipal Court, Central Judicial District, Marin County, California; *Zeitlin v. Arnebergh*, 211 A. C. A. 31, 27 Cal. Rptr. 320; *Commonwealth v. Robins*, No. 3177, Court of Common Pleas, County of Philadelphia, Pennsylvania; *State v. Huntington*, No. 24657, Superior Court, Hartford County, Connecticut; *McAuley v. Tropic of Cancer*, No. 300-059, Circuit Court, Milwaukee County, Wisconsin; *State v. Goodhue*, No. 2223, Superior Court, Grafton County, New Hampshire; *Grove Press v. Calissi*, (D. N.J.); *People v. Rossett*, Kings County, New York.

self demonstrates the importance of this Court's hearing this case.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 72

BRADLEY REED SMITH, *Petitioner,*

v.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*

BRIEF OF

GAY WILSON ALLEN; AARON ASHER; BETTY BALLANTINE (Ballantine Books, Inc.); IAN BALLANTINE (Ballantine Books, Inc.); SHEILA BARRY (Taplinger Publishing Co., Inc.); JACQUES BARZUN; HOWARD K. BAUERNFEIND (J. B. Lippincott Co.); ERIC BENTLEY; LOUISE BOGAN; CHARLES G. BOLTE (The Viking Press, Inc.); EDWARD E. BOOHER (McGraw-Hill Book Co.); WALTER I. BRADBURY (Harper & Brothers); NED BRADFORD (Little, Brown & Co.); GEORGE BRAZILLER (George Braziller, Inc.); GERMAINE BREE; HARVEY BREIT; JOHN MALCOLM BRINNIN; CHARLES R. BYRNE (Macfadden-Bartell Corp.); HERB CAEN (San Francisco Chronicle); ANGUS CAMERON (Alfred A. Knopf, Inc.); MARK CARROLL (Harvard University Press); JOHN CIARDI; HAROLD CLURMAN; EVAN S. CONNELL (Contact); JOHN COURNOS; PASCAL COVICI (The Viking Press, Inc.); EDWARD DE GRAZIA; PATRICK

(Continued on inside of cover)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 812

BRADLEY REED SMITH, *Petitioner,*

v.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*

BRIEF OF

GAY WILSON ALLEN; AARON ASHER; BETTY BALLANTINE (Ballantine Books, Inc.); IAN BALLANTINE (Ballantine Books, Inc.); SHEILA BARRY (Taplinger Publishing Co., Inc.); JACQUES BARZUN; HOWARD K. BAUERNFEIND (J. B. Lippincott Co.); ERIC BENTLEY; LOUISE BOGAN; CHARLES G. BOLTE (The Viking Press, Inc.); EDWARD E. BOOHER (McGraw-Hill Book Co.); WALTER I. BRADBURY (Harper & Brothers); NED BRADFORD (Little, Brown & Co.); GEORGE BRAZILLER (George Braziller, Inc.); GERMAINE BREE; HARVEY BREIT; JOHN MALCOLM BRINNIN; CHARLES R. BYRNE (Macfadden-Bartell Corp.); HERB CAEN (San Francisco Chronicle); ANGUS CAMERON (Alred A. Knopf, Inc.); MARK CARROLL (Harvard University Press); JOHN CIARDI; HAROLD CLURMAN; EVAN S. CONNELL (Contact); JOHN COURNOS; PASCAL COVICI (The Viking Press, Inc.); EDWARD DE GRAZIA; PATRICK DENNIS; JOHN DOS PASSOS; JAMES W. ELLISON (Holt, Rinehart & Winston, Inc.); RICHARD ELLMAN; JASON EPSTEIN (Random House); LAWRENCE FERLINGHETTI (City Lights Books); JOHN G. FULLER (Saturday Review); BERNARD GEIS (Bernard Geis Associates); MAXWELL GEISMAR; JACK GELBER; EMANUEL GELTMAN (The Free Press of Glencoe, Inc.); ARNOLD GINGRICH (Esquire); K. S. GINIGER (Hawthorne Books, Inc.); HERBERT GOLD; HARRY GOLDEN; MITCHELL GOODMAN; ROBERT GOTTLIEB (Simon & Schuster, Inc.); HOWARD GREENFELD (The Orion Press, Inc.); JOHN HOWARD GRIFFIN; RICHARD L. GROSSMAN (Grossman Publishers, Inc.); WILLIAM B. HARVEY (New York University Press); HIRAM HAYDN (Atheneum Publishers); HUGH M. HEFNER (Playboy); CHARLES A. S. HEINLE (Chilton Co., Book Division); CECIL HEMLEY (The Noonday Press); JOHN HERSEY; GRANVILLE HICKS; LAWRENCE HILL (Hill & Wang, Inc.); WILLIAM HOGAN (San Francisco Chronicle); TAY HOHOFF (J. B. Lippincott Co.); JOHN CLELLON HOLMES; B. W. HUEBSCH (The Viking Press, Inc.); RICHARD HUETT (Dell Publishing Co., Inc.); FRED JORDAN (Grove Press, Inc.); JACK KEROUAC; CHESTER KERR (Yale University Press); DONALD S. KLOPFER (Random House); HERMAN

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AS AMICI CURIAE

INTEREST OF AMICI CURIAE AND PRELIMINARY STATEMENT

This brief is submitted, with the consent of the parties, on behalf of the more than one hundred authors, editors and publishers named.

We understand the Constitutional guaranties of freedom of expression forbid a State to suppress the public circulation of any work expressing ideas which may have the slightest social importance, *Roth* v. *United States*, 354 U. S. 476. We believe this must hold true even if some, many, or most persons cannot find this importance. We believe this must hold true

even if a jury or judge cannot find this importance. And we believe a work which has literary or artistic importance cannot be deemed to be empty of social importance.

Accordingly, we believe the action of the Superior Court of the State of California for the County of Los Angeles, in upholding the conviction of Mr. Bradley Reed Smith for possessing and distributing Henry Miller's *Tropic of Cancer* was in violation of the protection afforded by the Constitutional guaranties. We further believe this case presents questions of utmost gravity for the Constitutional freedom of American writers, artists, booksellers, book publishers, and the American reading public.

ARGUMENT

I

This appears to be the first time in fourteen years[1] that this Court has had an opportunity squarely to examine a "typical" obscenity prosecution in a situation

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[1] In *Doubleday* v. *New York*, 335 U. S. 848 (1948), a bench of this Court divided equally over the conviction of a publisher distributing Edmund Wilson's "*Memoirs of Hecate County.*" In noting a distinction between material such as "*Memoirs of Hecate County*", "*Tropic of Cancer*", and "*The Devil Rides Outside*" on the one hand, and material of the kind indicated in notes 2 and 3 *infra* on the other, *amici* are not to be misunderstood as implying that the suppression of the latter or the punishment of its distributors, was or would be constitutional. The intent is solely to point up how, in terms of the Court's opinion in *Roth*, the issues framed by Petitioner's conviction differ from those framed by the contrasted cases in which the Court had before it material whose literary (or other) importance could apparently be ignored. As Professor Harry Kalven has analysed *Roth*, "(Obscenity) is banned not because it is dangerous but because it is worthless." The Metaphysics of the Law of Obscenity, *The Supreme Court Review* (1960) at 15.

involving a work whose literary and artistic importance cannot be ignored. In *Roth* v. *United States, supra,* and *Alberts* v. *California,* 354 U. S. 476, as in *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, the material which formed the basis for the federal and state prosecutions and the federal administrative exercise of restraint apparently raised no such claim to importance.[2] In *Smith* v. *California,* 361 U. S. 147, and in *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436, the material forming the basis for the State prosecution and exercise of restraint also apparently raised no such claim to importance.[3] In *Butler* v. *Michigan,* 352 U. S. 380, a work raising some claim to importance was brought before this Court,[4] but there the Court's deliberations were focused on a special statute designed to protect children, but unconstitutionally operating to restrain the reading of adults.

The case at hand, like *Roth, Alberts* and *Smith,* involves a typical criminal obscenity statute. But unlike *Roth, Alberts* and *Smith,* this case presents, and for the first time apparently since *Doubleday* v. *New York,* 335 U. S. 848, the issue of whether a work

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[2] In *Roth,* the only material which might have raised such claim (*"American Aphrodite"*) was eliminated from consideration by the terms of the Court's grant of the writ of *certiorari.* In *Alberts,* bizarre photographs were largely involved, and the constitutionality of the statute as applied to this material was not questioned. See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 19-26 (1960). In *Manual Enterprises,* photographic magazines "beamed at homosexuals" were involved.

[3] In *Smith,* the material was *"Sweeter Than Life"*; In *Kingsley Books,* *"Nights of Horror"*. See Lockhart & McClure, op. cit. *supra* note 2 at 29, 43.

[4] *"The Devil Rides Outside"* by Alfred Butler.

making any claim to importance may be suppressed by such a statute—consistently with the Constitutional guaranties of free expression.

II

We urge the Court to grant recognition to the importance of literature and art in the development of a free market place of ideas. "The framers of the First Amendment must have had literature and the arts in mind." Chafee, *Government and Mass Communications* (1947) at 53. It does not seem open to question but that works of "fiction" and "art" may contribute as much to the interplay of competing ideas and the development of public information and learning as works conveying "news," "truth" or "history". To ban a novel of importance may as seriously impede the desirable public circulation of ideas as to ban a news journal of importance. It seems superfluous to recite more than the following, from among the findings of cognizant authorities,[5] to substantiate this proposition. The distinguished American philosopher and educator, Professor John Dewey, reported:

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[5] Dewey, *The Public and Its Problems* (1946), especially pages 163, 183-184; Dewey, *Freedom and Culture* (1939), especially pages 9-10; Freud, *Gesammelte Schriften* (1940-1952), Vol. I, 227, Vol. VII, 33, 70, Vol. XIV, 399, 495, quoted in Jones, *The Life and Work of Sigmund Freud*, Vol. III, 418-420 (1957). McKeon, Merton & Gelhorn, *The Freedom to Read* (1957); Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 368-373 (1954); Kaplan, *Obscenity As An Esthetic Category*, 20 Law & Contemp. 556-559 (1955); Goodman, "Pornography, Art & Censorship" in *Commentary* (March, 1961) at 203-212; Meiklejohn, "The First Amendment is an Absolute" in *The Supreme Court Review* (1961) at 245, 257, 262-263; Kallen, "The Ethical Aspects of Censorship" in *Social Meaning of Legal Concepts* No. 5, N.Y.U. School of Law (1953) at 34-71.

> "The freeing of the artist in literary presentation . . . is as much a precondition of the desirable creation of adequate opinion on public matters as is the freeing of social inquiry . . . . Artists have always been the real purveyors of news, for it is not the outward happening in itself which is news, but the kindling by it of emotion, perception and appreciation."[6]

The founder of the modern psychological science, Dr. Sigmund Freud, observed:

> "Imaginative writers are valuable colleagues and their testimony is to be rated very highly . . . because they draw on sources that we have not yet made accessible to science . . . . The portrayal of the psychic life of human beings is, of course, (the imaginative writer's) most special domain; he has always been the forerunner of science, and thus scientific psychology too."[7]

It is also evident that the largest single threat of interference with literary and artistic expression, arises out of actions taken under color of state and federal

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[6] *The Public and Its Problems* (1946) at 9-10. Compare the words of President James B. Conant, Harvard University, in an address to the Modern Language Association of America (1940): "It seems to me unlikely that a future citizen of a free country can be developed by education, in these days . . . without the devout study of great literature. Such study is probably essential because for many people a sense of values must be felt, not proved by argumentation. For these people, it seems to me, not philosophy but poetry—using the word in its widest sense—poetry alone can first open the doors of discrimination." Quoted in "The Students Right to Read" of the National Council of Teachers of English (1962), at 7.

[7] *Gesammelte Werke* (1940-52) Vol. VII at 33, 70; quoted in Jones, *The Life and Work of Sigmund Freud*, Vol. III at 419 (1957).

obscenity statutes.[8] There is no need to explore the deep-seated connections between sex, religion, literature and art[9] to appreciate why the sexual aspects have been responsible for by far the greater part of all censorship of literature and art; it should be enough to review the catalogues of important works suppressed for this reason in the past, and the role played by government in that suppression.[10]

Until the sexual aspect is free of governmental surveillance, neither literature nor art can in this country be wholly free, nor the people's right to read be full-formed.

It may not be sufficient, we fear, simply to lay "obscenity" on one side of the border of constitutional protection, and "literature" and "art" on the other, just as it was apparently not quite sufficient for this Court to lay "material expressing ideas having even the slightest social importance" on the protected side and "obscenity" on the other, *Roth* v. *United States*, *supra*. For there can be no effective freedom for literature and art so long as constitutional protection may be withdrawn by a jury or judge capable of finding its

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[8] Downs, *The First Freedom; Liberty and Justice in the World of Books and Reading* (1960); Lockhart & McClure, *Literature, The Law of Obscenity and the Constitution*, *supra* note 2 at 372-373.

[9] But see, as illustrative, Cornford, *The Origin of Attic Comedy* (1961); Kaplan, *Obscenity as an Esthetic Category* in "Obscenity and the Arts", 20 Law & Contemp. 544 (1955); Goodman, *Pornography, Art & Censorship*, in *Commentary* (March, 1961) at 203-212.

[10] Ehrlich, *Howl of the Censor* (1961); Haight, *Banned Books* (1955); Blanshard, *The Right to Read* (1955); Lockhart & McClure, op. cit. *supra* note 8 at 334-374; deGrazia; *Obscenity and the Mail*, 20 Law & Contemp. 615 (1955).

prurient interests aroused (*Roth* v. *United States*, *supra*) and its sense of decency offended, (*Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478), by this page or that, perhaps even by a work as a whole, but incapable of finding an importance which may permeate the challenged work.[11]

III

We are mindful the case at hand presents a situation where "experts" appeared before the jury and disagreed about the importance to be assigned *Tropic of Cancer* and its capacity to appeal to prurient interests. We feel this disagreement helps point up the threat to freedom of expression imbedded in criminal proceedings against possessors or distributors of literature or art. For, while on the one hand, it cannot be doubted that *Tropic of Cancer* has importance for many, yet on the other hand, there are those persons, even experts, who would deny its importance and urge that the work be suppressed. But we fail to understand how literary or artistic expression can be required to abide by any consensus—whether public, expert, or jural—if it is to be free and protected by the Constitutional guaranty. However well constituted the jury system may be to weigh questions of appreciable fact, it does not seem

[11] Compare the Superior Court's description of *Tropic of Cancer's* "importance" with those, for examples, of: poets Anais Nin and Karl Shapiro in the Preface and Introduction, respectively, to *Tropic of Cancer;* critics Edmund Wilson in Twilight of the Expatriates", written in 1938 and reprinted in *The Shores of Light* (1952) at 705-08, Wallace Fowlie in *Age of Surrealism* (1950) at 184-185, and George Orwell in *Inside the White Whale and Other Essays* (London, 1940) at 131-146, 176, 184; reviewers Dorothy Parker, Eric Moon, Ben Ray Redman, Harry T. Moore and Terry Southern in Appendix I of the *Petition for Writ of Certiorari*, herein.

fit to measure the freedom needed for literature or art to fulfill its important, sometimes revolutionary functions, nor to decide what license the community may have to read.[12]

We may join those who deplore material calculated to pander to prurient interests,[13] and yet appreciate the foolishness of sacrificing freedom of literary and artistic expression on the altar of the variable sensibilities of the average man. If no formula for discouraging the pandering without maintaining a threat to the freedom can be found by this Court, a serious question arises whether the Constitution does not compel the abandonment of all typical obscenity laws, as applied to adults.[14]

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[12] "The right of any individual to read is basic to democratic society. This right is based on the only tenable assumption for democratic living: that the educated free man possesses the powers of discrimination and is to be entrusted with the determination of his own actions. The right to read, like all rights embedded in our constitutional traditions, can be used wisely or foolishly. In many ways education is an effort to improve the quality of the choices which are the exercise of this right. But to deny the opportunity of choice in the fear that it may be unwisely used is to destroy the freedom itself. For this reason, we respect the right of individuals to be selective in their own reading and of individuals and groups to express their views for the guidance of others. But for the same reason, we oppose efforts by individuals or groups to limit the freedom of choice of others or to impose their own standards or tastes upon a community at large." National Council of Teachers of English, "The Students' Right To Read" (1962) at 8.

[13] See American Law Institute *Model Penal Code*, Proposed Official Draft (May 4, 1962), § 251.

[14] Compare the Statement of Policy issued by the *American Civil Liberties Union* May 28, 1962, following a three-year review of censorship of allegedly obscene material, suggesting "limitations of expression on the ground of obscenity are unconstitutional", at least in the absence of clear proof the material would cause

But we believe some such formula may be found, that the *Roth/Manual Enterprises* test can be further amplified in such a way as effectively to free American literary and artistic expression from the debilitating restraints imposed by state and federal prosecutions, and the special group pressures which generate them. We respectfully urge this Court to clarify the test's applicability to literary and artistic works, for the *Roth/Manual Enterprises* formula has not discouraged their censorship.[15]

IV

Since *Roth*, over fifty proceedings, or challenges to proceedings, designed to remove *Tropic of Cancer* from public book stores and libraries have been instituted, under color of typical State laws and municipal ordinances,[16] despite the decision of federal authorities

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"in a normal adult, behavior which has validly been made criminal by statute," or where the target group of allegedly obscene material is children and its effect would lead to behavior violative of a criminal statute; cited in the *Newsletter on Intellectual Freedom* of the American Library Association, XI, No. 3 (October, 1962) at 21.

[15] See the many incidents currently reported in the *Newsletter on Intellectual Freedom* of the American Library Association and in the *Censorship Bulletin* and *Freedom To Read Bulletin* of the American Book Publishers Council.

[16] See the library and bookstore cases reported in the *Newsletter on Intellectual Freedom* of the American Library Association, Vol. 10, No. 4 (January, 1962), Vol. 11, No. 1 (April, 1962), Vol. 11, No. 2 (July, 1962), Vol. 11, No. 3 (October, 1962), Vol. 11, No. 4 (December, 1962), Vol. 12, No. 1 (January, 1963). A review of libraries obliged to remove the book and those which successfully resisted pressures to remove it is set forth in Vol. 11, No. 1 (April, 1962). The Los Angeles City Library removed *Tropic of Cancer* following Petitioner's conviction, but announced it would carry *Tropic of Capricorn*, at least until threatened with suit by Respondent. See *Los Angeles Times* for Aug. 24, 1962.

(following *Roth*) not to interfere with the book's circulation.[17] Many of these controversies still pend in state courts where booksellers wait in jeopardy of fines or imprisonments, while in each area affected by the pertinent court's jurisdiction, the book is being effectively suppressed.[18]

On the other hand, more than one million copies of the book have been distributed through the mails and over the counters of bookstores and libraries throughout the land.[19] Although we would not adduce such "best-seller" popularity as a *necessary* criterion of a work's social importance, it seems to us unquestionably *sufficient*.

In our view, it is constitutionally impermissible that a bookseller in one county or one state may successfully be prosecuted for selling a book which booksellers in

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[17] See Appendices E and F of *Petition For Writ of Certiorari*, herein.

[18] Op. cits. *supra* note 16. See also *N.Y. Times Book Review*, "The Most Recent Troubles of Tropic" by Anthony Lewis at 4 (Jan. 21, 1962). There apparently were twenty-seven arrests alone in five counties of New Jersey. Other cities and counties include: Brooklyn, N.Y.; Rochester, N.Y.; Syracuse, N.Y.; Buffalo, N.Y.; Lorain, Ohio; Cuyabroga Falls, Ohio; Mahoning County, Ohio; Athens, Ohio; Youngstown, Ohio; Sumit County, Ohio; Minneapolis, Minn.; Milwaukee, Wisc.; Marion County, Ind.; Chicago, Ill.; Lake County, Ill.; Denver, Colo.; Chattanooga, Tenn.; Hartford, Conn.; Dade County, Fla.; Duval County, Fla.; Marin County, Calif.; La Jolla, Calif.; Dallas, Texas; Houston, Texas; San Antonio, Texas; Louisville, Ky.; Hartford County, Conn.; Philadelphia, Pa.; Wilmington, Del.; Seattle, Wash.; Indianapolis, Ind.; St. Louis, Mo.; Oklahoma City, Okla.; Birmingham, Ala.; Des Moines, Iowa.

[19] By April, 1962, some 1,100,000 copies had been sold. See *N.Y. Herald Tribune Book Section*, April 29, 1962, at page 3. As of January, 1962, some 2,500,000 copies were in print. See *N.Y. Times Book Review*, op. cit. *supra* note 18 at 4. The work appeared on the *N.Y. Times* national best-seller lists from August 27, 1961 through December 3, 1961.

other counties and states may freely sell,[20] under virtually identical statutory prohibitions. In our view, the Constitutional blanket of protection of expression must be uniform, and the Constitutional freedom to read, equal.[21] Whatever right the states may have to exercise their police powers disparately must expire before a crazy-quilt is made of the First Amendment guaranty.

We understand the Superior Court of California, after upholding petitioner's conviction, nevertheless certified for higher court consideration, certain "important questions of law" which it felt "should be answered", to wit:

> "1. Is the book, 'Tropic of Cancer' obscene?
>
> "2. If the book has literary merit does that alone give it redeeming social importance which takes it out of the class of being obscene?"[22]

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[20] While Petitioner herein was convicted, booksellers in La Jolla and Marin County, California were acquitted. Booksellers in the counties and states unaffected by the proceedings mentioned *supra* note 18, freely sell the book.

[21] As indicated *supra* note 18 and in the text thereto, persons in some counties and states are being denied access to the book whereas persons in others are not. If freedom to read is a right protected by the First Amendment (Cf. *Smith* v. *California*, 361 U.S. 147, 153) it is a right of all citizens irrespective of the state in which they reside; the states are forbidden uniformly from abridging it, as they are forbidden from abridging their citizens' right to assemble or petition—by operation of the "privileges and immunities" clause, if not the "due process" clause of the Fourteenth Amendment. See Crosskey, *Politics and the Constitution*, II at 1094-5 (1953). Cf. Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, *supra* note 2 at 110-14.

[22] See Appendix B of the *Petition For Writ of Certiorari* herein: Order Certifying Cause To District Court of Appeal, October 24, 1962.

We believe these questions to have great portent for the American public's right to read, and for the future of American literature and art. We urge that both questions be considered by the Court. Once considered, we are sure the sound application of Constitutional principles will require the first to be answered "no", the second to be answered "yes". These were the answers recently given by the highest State court yet to rule on *Tropic of Cancer*, a court no stranger to obscenity censorship—The Supreme Judicial Court of the Commonwealth of Massachusetts. *Attorney General* v. *Book Named "Tropic of Cancer"*, 184 N.E. 2d 328. That Court rested its decision: "squarely on the First Amendment".

CONCLUSION

We respectfully urge this Court to issue a writ of certiorari.

Respectfully submitted,

EDWARD DE GRAZIA
Attorney for Amici Curiae,
1001 Connecticut Ave., N.W.
Washington 6, D. C.

[redacted]

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[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

BRADLEY REED SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Brief of Respondent in Opposition to Granting of Writ of Certiorari.

Statement.

Petitioner was charged in a verified amended complaint with violation of Section 311.2 of the California Penal Code, knowingly distributing obscene matter, to wit, the book *Tropic of Cancer,* by Henry Miller.

Petitioner was duly arraigned and entered a plea of not guilty. On the trial date petitioner waived trial by jury; however, he was tried by jury on demand of the plaintiff, The People of the State of California. The trial commenced January 15, 1962, and culminated in a guilty verdict February 23, 1962. Petitioner was grant-

ed probation on condition he serve the first thirty days of his probationary period in jail.

On appeal to the Appellate Department of the Superior Court of the State of California, for the County of Los Angeles, the order granting probation was affirmed (unpublished opinion, Petition, App. A). As stated in the petition, that court on its own motion certified the cause to the District Court of Appeal of the State of California, and such court denied the certification. Petitioner now seeks a writ of certiorari.

ARGUMENT.

I.

Sections 311.2 and 311(a) of the California Penal Code Provide a Reasonable Ascertainable Standard of Guilt.

This Court, in *Roth v. United States* and *Alberts v. California* (1957), 354 U. S. 476 at 489, presented the following definition of obscenity: . . . . . .

> "Whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."

And further, in footnote 20, page 487:

> "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, Sec. 207.10 (2) (Tent Draft No. 6, 1957), viz:
>
> ". . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters . . ."

In 1961 California amended its obscenity statute (Penal Code Section 311.2) to provide:

> "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute, or to exhibit or offer *to* distribute, any obscene matter is guilty of a misdemeanor." (Stats. 1961, c. 2147, p. 4428, sec. 5.)

Section 311(a) of the Penal Code defines "obscene" to mean:

> " 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." (Stats. 1961, c. 2147, p. 4427, sec. 5.)

The phrase "utterly without redeeming social importance" appears to be taken from *Roth-Alberts*, at page 484.

It is clear that California, in enacting these statutes, has so closely followed the *Roth-Alberts* case that in effect this Court has written them.

II.

The Trial Court Followed the Proper Constitutional Standard as to Instructing the Jury on Contemporary Standards.

Petitioner urges that the trial court purportedly restricted the limits of candor in description or representation of sex, nudity and excretion, to the community of Los Angeles, whereas a national standard should have been applied.

Although petitioner did submit an instruction [C. T. 61] purporting to clarify the meaning of contemporary standards, such instruction by its very terms, rather than clarifying, would have confused this issue and was properly refused because, from its context, it purported

to request a personal opinion of the trial judge rather than a statement of the law. An instruction that confuses and befogs the issue is properly refused (*People v. Roe* (1922), 189 Cal. 548, 559, 209 Pac. 560); where an instruction is an incorrect statement of the law it is properly refused (*People v. Housman* (1941), 44 Cal. App. 2d 619, 628, 112 P. 2d 944); even assuming for purposes of argument that the instruction was partially correct, the court is justified in rejecting the instruction as a whole because of the parts manifestly improper (*People v. Lorraine* (1928), 90 Cal. App. 317, 335, 265 Pac. 893).

The trial court, in its instruction to the jury,[1] did not limit the word "community" to the City of Los Angeles but in fact instructed in the language of Section 311(a) and the *Roth* case: ("applying contemporary standards . . . which goes substantially beyond customary limits of candor in description or representation of such matters . . .").

There may have been an academic discussion as to the limits of contemporary standards at the bench, but no such discussion ever took place in the presence of the jury.

At no place in the record may be found petitioner's objection to, or the slightest disagreement with, the trial court's position as to the scope of contemporary

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[1]Plaintiff's two-page Instruction on Penal Code Section 311, subsection (a), citing *Roth v. United States* and *In re Harris*.

standards, nor did he offer to prove that the contemporary standards of Los Angeles were in any manner different from those elsewhere.

The impropriety of imposing a national community standard of obscenity upon the states, as petitioner suggests, has been best expressed by Mr. Justice Harlan, dissenting and concurring in *Roth-Alberts* (*supra*, at p. 504):

> "But in dealing with obscenity we are faced with the converse situation, for the interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsiblity for the protection of the local moral fabric."

And further (at p. 505):

> "It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories. 'State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation.' Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State might

be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books."

III.

The Book "Tropic of Cancer" by Henry Miller Is Obscene.

The pattern of petitioner's trial was to great extent determined by this Court. In enacting its new obscenity statutes under which petitioner was prosecuted, California of course followed the rule of *Smith v. California*, 361 U. S. 147, and included the necessary element of scienter. California Penal Code Section 311.2 provides that the acts prohibited therein be done *knowingly*, and Section 311(e) (App. A) defines *knowingly* as having knowledge that the matter is obscene.

The Supreme Court of California in *In re Harris* (1961), 56 Cal. 2d 879, 366 P. 2d 305, declared that the exclusion of expert testimony in an obscenity case was denial of due process of law, following the lead of Mr. Justice Frankfurter concurring in *Smith v. California*.

The scienter requirements of *Smith v. California* and the code section were met with testimony that, at the time of the sale of the book to the arresting officer,

petitioner stated he knew the book *Tropic of Cancer* was obscene.[2-3]

The book [Pltf. Ex. 4, Rep. Tr. Vol. 2, p. 348, line 1] was read to the jury and thereafter plaintiff produced and qualified as experts these eighteen witnesses, who testified that in their opinion *Tropic of Cancer* was utterly without redeeming social importance and was obscene as such term is defined by California Penal Code Section 311(a).

Leon Uris

[Rep. Tr. Vol. 11, pp. 1088-1106][4]

Professional writer [p. 1088, line 24].

Author of such internationally famous novels as *Exodus, Battle Cry, The Angry Hills,* and the current bestseller *Mila 18* [p. 1089, lines 15-26; p. 1091, lines 20-21].

Dr. Frank Baxter

[Rep. Tr. Vol. 9, pp. 350-498].

Lecturer and television personality [p. 350, lines 23-24].

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[2]People's Exhibit 1, a transcript of a tape recording of a conversation between petitioner and the arresting officer prior to arrest, admitted in evidence Rep. Tr. Vol. I, p. 81, lines 9-11:

Question [by arresting officer, at p. 1, lines 16-17]: You say it [Tropic of Cancer] is obscene?

Answer (by petitioner): It's obscene.

Question [by arresting officer, at p. 4, lines 13-17]: I didn't see this [Tropic of Cancer] for sale down on the street? That's why—

Answer (by petitioner): We don't sell it down there.

Question. How come?

Answer. It's obscene—

[3]Rep. Tr. and Volume numbers indicate original page numbering in Reporter's Transcript.

[4]Rep. Tr. and Volume number indicates original page numbering in Reporter's Transcript.

Professor Emeritus of English and American Literature, University of Southern California for 31 years [p. 351, lines 1-3; 18-20]; Chairman of the English Department, U.S.C., for eight years [p. 351, lines 9-11]; Resident of Los Angeles County since 1930 [p. 350, lines 15-17].

Bachelor of Arts and Master of Arts degrees, University of Pennsylvania [p. 352, lines 16-18]; Doctor of Philosophy degree from Trinity College, Cambridge, England [p. 352, lines 19-21]; recipient of four Honorary Doctorates, three in Letters and one in Fine Arts [p. 358, lines 16-17].

Author of seven articles for the Encyclopedia Brittanica [p. 348, lines 24-25].

Past President of Phi Beta Kappa Chapter at U.S.C. [p. 353, lines 19-21]; served as First Chairman, U.S.C. Academic Senate [p. 353, lines 22-25].

The first individual in the United States to receive the George Peabody Award, a national honor for excellence in television programming [p. 355, lines 9-26]; has received approximately 35 national honors for pioneering in educational television, including The Sylvania, a citation from the National Association For Better Radio and Television, two Ohio State awards, and seven "Emmys" from the National Academy of Motion Picture Arts and Sciences, an "Emmy" being a statuette similar in nature to a motion picture "Oscar," awarded by the television industry to those in the industry whom the members deem worthy of praise [p. 357, lines 2-12].

Mrs. C. H. Culbertson

[Rep. Tr. Vol. 3, pp. 529-542].

President of the State of California Congress of Parents and Teachers, also known as the PTA [p. 529, lines 16-17]. The California Congress of Parents and Teachers comprise an organization of over a million and a half members [p. 529, line 23], making this group the largest parent-teacher assemblage within the United States.

Arthur J. Kates

[Rep. Tr. Vol. 2, pp. 438-528].

Owner-manager of the Sunset News Co., Los Angeles [p. 440, lines 21-24], the largest distributor of periodicals in California, and one of the two or three largest distributors in the United States [p. 442, lines 2-8].

Mr. Kates' Sunset News Co. distributes ninety per cent of all periodicals sold in the Los Angeles area [p. 442, lines 14-21].

Sunset News Co. distributes to 1400 different accounts [p. 443, line 9], the leading department stores in Los Angeles [p. 443, lines 14-15]; supermarkets [p. 443, lines 20-24]; drug stores [p. 443, lines 8-12]; bookstores [p. 444, lines 13-17], and such universities as U.S.C., U.C.L.A., Los Angeles State College [p. 444, lines 19-22].

The volume of Sunset News Co. periodicals sold to its 1400 accounts in 1961, included 22 million single magazine copies and five million copies of paperback books [p. 445, lines 4-8], and Sunset News Co. distributes between 200 and 250 different titles of books and magazines per week [p. 446, line 26].

The magazine titles run the gamut from Saturday Evening Post, Look, Life, Time [p. 515, lines 8-10], to such girlie magazines of nude models and chorus girls as Dude, Gem and Playboy [p. 475, lines 1-3; p. 483, lines 16-18].

Mr. Kates has a Bachelor of Arts degree from Stanford University and was a member of Phi Beta Kappa while at Sanford [p. 439, lines 6-20].

He has been a resident of Los Angeles for fifty years [p. 438, line 23]; has been in the periodical distributing business for over twenty-five years in Los Angeles [p. 446, lines 8-11], and has by virtue of this experience an intimate knowledge of the books and magazines that circulate as community standards in the community of Los Angeles [p. 446, lines 12-20].

The paperback edition of *Tropic of Cancer* was offered to Mr. Kates by Grove Press for distribution to his 1400 accounts prior to the arrest of petitioner Bradley Reed Smith [p. 450, lines 15-27], an offer which Mr. Kates refused [p. 451, line 22], in spite of the fact that Grove Press offered to defray the legal expenses of any prosecution which might arise as a result of the distribution of the book [p. 502, line 20, to p. 503, line 10].

Rabbi Ernest R. Trattner
[Rep. Tr. Vol. 9, pp. 449-581].

Rabbi of Westwood Temple [p. 500, line 20]. Westwood Temple has a congregation of 700 Jewish families. Rabbi Trattner has resided in Los Angeles for forty years [p. 500, line 23].

Rabbi Trattner received his Bachelor of Arts degree from the University of Southern California, a Master's degree from Columbia University, and Honorary Doctorate degrees from Andhra University, Jaipur, India, the University of Bari, Italy, and the Institute of Religious Science and School of Philosophy of Los Angeles [p. 501, line 1, to p. 502, line 4; p. 560, lines 5-19].

Rabbi Trattner is the author of five published works: *Unraveling the Book of Books, The Autobiography of God, As a Jew Sees Jesus, The Architect of Ideas*, and *Understanding the Talmud* [p. 503, lines 24-26].

Dr. Marcus Crahan

[Rep. Tr. Vol. 10, pp. 642-687],

Psychiatrist and Physician and Surgeon [p. 643, line 10].

Medical Director of the Correctional Facilities of Los Angeles County, with 8000 inmates under his direct supervision and control [p. 643, lines 11-15; p. 648, lines 1-2].

Dr. Crahan is presently a member of the Los Angeles Superior Court panel of psychiatric experts, and is also a member of the Department of Mental Hygiene for Los Angeles County [p. 643, line 16-18]. He has conducted psychiatric examinations, by court appointment, for between 5000 and 10,000 individuals [p. 644, lines 7-9].

Dr. Crahan received his Bachelor of Arts and Doctor of Medicine degrees from Syracuse University. He has resided in Los Angeles since 1925 [p. 643, line 4; p. 644, lines 10-25]. He is currently a professor at the University of Southern California School of Medicine, and on the Staff of St. Vincent's and Los Angeles County General Hospitals [p. 645, lines 1-7].

Dr. Crahan has conducted psychiatric and medical research at U.C.L.A., California Institute of Technology, Johns Hopkins University, and U.S.C.

Dr. Crahan has served as Chairman of the Church and Community Committee of Los Angeles, which committee is comprised of all the major churches, leading educators, citizens, public officials and members of the judiciary, whose function is to deal with the problem of sexual deviancy in Los Angeles [p. 645, lines 13-23].

An avid book collector, Dr. Crahan is a regular supporter of such libraries as Princeton, Syracuse, Claremont, Occidental, California at Berkeley, the Southwest and Los Angeles County Museums [p. 646, lines 21-24]. He is a member of such book collectors' clubs as Groiler's of New York, The Roxboro of San Francisco, and the Zamarano of Los Angeles. He has served as President of the Zamarano Club of Los Angeles [p. 646, line 25, to p. 647, line 3].

Dr. Crahan's personal library consists of from three to four thousand volumes [p. 647, lines 16-17].

Dr. C. C. Trillingham

[Rep. Tr. Vol. 4, pp. 626-667].

Los Angeles County Superintendent of Schools since 1942 [p. 626, line 25, to p. 627, line 8]. Dr. Trillingham has jurisdiction over 1500 schools which comprise Los Angeles County, including all public schools from elementary through junior college [p. 627, lines 9-17], encompassing an enrollment of 1,500,000, pupils [p. 628, lines 11-12].

Dr. Trillingham received his Bachelor of Arts, Master of Arts and Doctor of Philosophy degrees from the

University of Southern California [p. 628, line 23, to p. 629, line 4].

President of the American Association of School Administrators for the year 1958, a nation-wide organization comprising 13,000 educators [p. 630, lines 18-26].

Past President of the Los Angeles Lions Club [p. 629, lines 5-10]; member of the Board of Trustees of Whittier College for 17 years [p. 630, lines 6-7]; member for the past 17 years of the State of California Curriculum Commission.

Dr. Raymond Lindquist

[Rep. Tr. Vol. 5, pp. 894-937].

Senior Minister of the Hollywood First Presbyterian Church since 1953 [p. 894, lines 20-26].

Dr. Lindquist's church has a congregation of 8000 members, making it the largest Presbyterian Church in the United States, and probably the largest in the world [p. 895, lines 3-9].

He received his Bachelor of Arts degree from Wheaton College, Illinois; attended Columbia University Law School for one year; acquired a Bachelor of Theology at Princeton Theological Seminary, and a Master of Arts in Philosophy at Princeton. He is the recipient of an Honorary Doctor of Divinity degree from Cumberland University, Tennessee, and an Honorary Doctor of Laws from Bloomfield College, Bloomfield, New Jersey [p. 899, lines 11-18].

In addition to his position as Senior Minister of the Hollywood First Presbyterian Church, Dr. Lindquist is also President of the Board of National Missions

of the Presbyterian Church [p. 895, lines 22-23]; a Trustee of Princeton Theological Seminary [p. 896, lines 14-15], as well as a Director of the Presbyterian Ministers Fund, the oldest insurance company in the United States [p. 897, lines 2-3].

Dr. Howard S. McDonald
[Rep. Tr. Vol. 5, pp. 779-817].

Dr. McDonald has been President of Los Angeles State College [p. 779, line 23] since 1958 [p. 780, line 3]. Los Angeles State College has an enrollment of 16,000 students [p. 780, lines 6-7]. Is Past President of Brigham Young University [p. 781, lines 1-2]; President of the combined Los Angeles City and Los Angeles State Colleges from 1949 to 1958, with an enrollment of 28,000 students [p. 781, lines 8-18].

Bachelor of Science degree from Utah State University; Masters and Doctorate of Philosophy degrees from University of California at Berkeley.

Mrs. Elizabeth Lewis
[Rep. Tr. Vol. 5, pp. 850-859].

Past Chairman and present member of the Board of Trustees, California Women's Prisons [p. 851, lines 4-15].

Mrs. Lewis received her Master's degree from the University of Edinburgh, Scotland [p. 851, line 23, to p. 852, line 2], and has resided in Los Angeles for 36 years [p. 851, line 1].

She was President of the Los Angeles Tenth District PTA from 1952 to 1954, which included the entire Los Angeles City School District [p. 852, lines 18-26].

President of the Federation of Community Coordinating Councils from 1946 to 1949. This is an organization made up of 100 local community councils whose functions are to deal with all types of problems arising in the community [p. 853, lines 7-24].

President of the Los Angeles YWCA for 3 years [p. 854, lines 6-8].

Member for 6 years of the Citizens Advisory Committee to the Attorney General on Crime Prevention [p. 855, lines 4-10].

Father Clarence E. Crowther
[Rep. Tr. Vol. 10, pp. 584-603].

Senior Episcopal Chaplain, University of California at Los Angeles [p. 584, lines 24-26].

Bachelor of Arts degree, University of Leeds, England; Bachelor of Laws and Master of Laws, University of Leeds. Past Professor of criminal and constitutional law, Oxford University [p. 585, line 23, to p. 586, line 7].

Graduate of Oxford Seminary, Oxford, England; ordained to the ministry of the Church of England in 1956 [p. 586, lines 11-13].

Dr. Ellis A. Jarvis
[Rep. Tr. Vol. 5, pp. 818-849].

Retired Superintendent of Schools for the Los Angeles City School District [p. 818, lines 23-25]. As Superintendent for the Los Angeles City Schools, Dr. Jarvis had 575 schools under his direct supervision from kindergarten through junior college, encompassing 675,000 pupils [p. 819, lines 9-16].

Bachelor of Arts degree from the University of California at Berkeley; Master of Science degree from the University of Southern California. Honorary Doctorate degree from the Los Angeles College of Osteopathic Physicians and Surgeons [p. 819, lines 19-23; p. 833, lines 1-2].

Marie Louise Kearns
[Rep. Tr. Vol. 10, pp. 778-830].

Author, lecturer, book reviewer, and teacher of creative writing [p. 779, lines 17-18], using the pen-names of Marie Metlova and Louise Hathaway [p. 779, lines 21-22].

Author of three published novels: *No Stranger to My Heart*, which was reviewed by the New York Times and other national reviews; *Black Bread and Caviar*, under the pen-name of Maria Metlova, and *The Enchanted Hour* [p. 780, lines 7-16].

Dr. Warren S. Jones
[Rep. Tr. Vol. 10, pp. 702-778].

Chairman of the Department of Speech and Dramatic Arts at Pepperdine College, Los Angeles [p. 703, lines 12-14]. Pepperdine College has an enrollment of approximately 1450 students [p. 707, line 14].

Dr. Jones teaches at the present time courses in rhetorical criticism (which includes the evaluation of written as well as oral discourse), advanced oral interpretation, and basic speech. Dr. Jones is presently directing four Master's degrees [p. 703, lines 24-26].

Dr. Jones received his Bachelor of Arts degree from David Lipscomb College, Nashville, Tennessee; Master's degree and Doctor of Philosophy degree from Wayne University [p. 704, lines 8-25].

Thomas A. Devine
[Rep. Tr. Vol. 10, pp. 604-641].

Professor of Sociology, Pierce College, Los Angeles [p. 604, lines 18-20]. Pierce College has an enrollment of approximately 9000 students [p. 605, line 3].

Professor Devine received his Bachelor and Master's degrees from Gonzaga University, Spokane, Washington [p. 606, lines 12-15].

John Otis Carney
[Rep. Tr. Vol. 11, pp. 831-875].

Professional writer [p. 831, line 20].

Bachelor of Arts in English from Princeton University [p. 831, lines 23-26].

Author of four published novels: *Love at First Flight, When the Bow Breaks, Yesterday's Hero* and *Good Friday, 1962* [p. 832, lines 11-15].

Author of the films: "Cinerama Holiday" [p. 838, lines 7-10] and "Pete Kelley's Blues" [p. 839, line 4].

Author of articles for Collier's and Coronet magazines [p. 839, lines 19-21].

Mr. Carney has reviewed books for the *Chicago Tribune, Minneapolis Star* and the *Los Angeles Times* [p. 840, lines 9-11].

Mrs. Edith Stafford
[Rep. Tr. Vol. 4, pp. 668-711].

Past President, Los Angeles City Board of Education [p. 670, lines 19-20] and a member of the Board for six years [p. 670, lines 15-16].

At present, lecturer to women's clubs, PTA's and parent groups throughout California [p. 668, lines 21-23].

Bachelor of Arts degree, Pomona College [p. 668, line 26]. Resident of Los Angeles for 36 years [p. 668, line 18].

Dr. Joseph Paul De River

[Rep. Tr. Vol. 11, pp. 877-891].

Psychiatrist and Physician and Surgeon [p. 877, line 24].

Dr. De River took pre-medical training at the University of Alabama and his Doctor of Medicine degree at Tulane University; he interned at Allegheny General Hospital and St. Joseph's Hospital in Reading, Pennsylvania, with specialties in brain surgery, and nervous and mental diseases [p. 879, lines 4-11; p. 891, lines 25-26].

Dr. De River is a Fellow of the American College of Surgeons [p. 880, lines 8-11]; is employed in an advisory capacity to the Los Angeles Municipal and Superior Courts [p. 878, line 20], and has served as a Medical-Legal member of the Adjudication Board of the Sawtelle Veterans Hospital [p. 883, lines 5-7].

From 1937 to 1950 Dr. De River served as Psychiatrist for the Los Angeles Police Department, as well as a consultant to the Arson Bureau, Los Angeles Fire Department [p. 883, lines 10-13].

Dr. De River is author of the published books, *The Sexual Criminal and Crime* and the *Sexual Psychopath* [p. 883, lines 17-22].

At the same time the instant case was being prosecuted and taken on appeal, an action for declaratory relief was filed in the Superior Court of California, for the County of Los Angeles, seeking declaration that *Tropic of Cancer* by Henry Miller was not obscene. The trial court ruled the book obscene under Section 311.2 of the California Penal Code. An appeal was taken resulting in affirmance of the judgment of the trial court (*Zeitlin v. Arnebergh*, 211 A. C. A. 31, 27 Cal. Rptr. 320). Following such decision the Supreme Court of California granted a hearing and transferred the cause to that court (59 A. C. No. 8, p. 1 of minutes). The cause has not yet been set for argument.

IV.

A State Court Jury's Determination of Obscenity When Based on a Valid Statute and Definition of the Term, Should Not Be Disturbed by the Supreme Court of the United States Unless Palpably Erroneous.

Admittedly there exists a difference of opinion as to whether *Tropic of Cancer* is obscene. However, as stated in *People v. Williamson* (1962), 207 A. C. A. 885, 888, 24 Cal. Rptr. 734 (Petition for hearing denied by California Supreme Court, 58 A. C. No. 23, p. 1 of minutes), the question of whether a particular book is obscene is primarily one of fact. Absent an erroneous and prejudically misleading definition of obscenity, the appellate court cannot upset the jury's determination that a book was obscene unless such court can say, upon consideration of the book in its entirety, the jury could not reasonably reach such a conclusion.

As stated in Lockhard and McClure (*Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 116):

> "Obscenity cases seldom involve factual disputes relating to the obscenity issue. Occasionally a factual issue may be raised by the testimony of literary experts, or by evidence relating to the audience and method of marketing or to scienter and the knowledge of the seller. In such cases the Supreme Court and other appellate courts should show proper deference to factual findings, though where a finding affects a claim of constitutional right the Supreme Court retains the power to determine whether the evidence supports the findings. . . ."

Petitioner's trial closely followed the guidelines established by this Court in the cases of *Roth-Alberts* and *Smith v. California*. The case presents to this Court the ultimate question of the stability of a state jury's verdict of obscenity fortified by the testimony of eighteen expert witnesses who, by their stature, local and national, are entitled to receive the utmost consideration and respect.

V.

Petitioner Has Not Been Denied His Constitutional Freedom of Speech and the Press.

The book *Tropic of Cancer* is obscene. As held in *Roth-Alberts*, obscenity is not within the area of constitutionally protected speech or press.

Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

PHILIP E. GREY,
Assistant City Attorney,

WM. E. DORAN,
Deputy City Attorney,

EDWARD P. GEORGE,
Deputy City Attorney,

Attorneys for Respondent.

APPENDIX A.

California Penal Code Section 311(e):

"Knowingly" means having knowledge th
matter is obscene. (Stats. 1961, c. 2147, p.
sec. 5).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 812

BRADLEY REED SMITH, *Petitioner*,

v.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*.

On Petition for Writ of Certiorari

BRIEF OF

GAY WILSON ALLEN; AARON ASHER (World Publishing Co.); HARRY S. ASHMORE (Encyclopaedia Britannica); BETTY BALLANTINE (Ballantine Books, Inc.); IAN BALLANTINE (Ballantine Books, Inc.); WILLIAM BARRETT; SHEILA BARRY (Taplinger Publishing Co.); JACQUES BARZUN; HOWARD K. BAUERNFEIND (J. B. Lippincott Co.); SAUL BELLOW; ERIC BENTLEY; LOUISE BOGAN; CHARLES G. BOLTE (The Viking Press, Inc.); E. E. BOOHER (McGraw-Hill Book Co.); WALTER I. BRADBURY (Harper & Brothers); NED BRADFORD (Little, Brown & Co.); GEORGE BRAZILLER (George Braziller, Inc.); GERMAINE BREE; HARVEY BREIT; JOHN MALCOLM BRINNIN; GEORGE P. BROCKWAY; EUGENE BURDICK; CHARLES R. BYRNE (Macfadden-Bartell Corp.); HERB CAEN (San Francisco Chronicle); ANGUS CAMERON (Alfred A. Knopf, Inc.); MARK CARROLL (Harvard University Press); JOHN CIARDI; HAROLD CLURMAN; EVAN S. CONNELL, JR. (Contact); JOHN COURNOS; PASCAL COVICI (The Viking Press, Inc.); PETER H. DAVISON; EDWARD DE GRAZIA; PATRICK DENNIS; JOHN DOS PASSOS; JAMES W. ELLISON (E. P. Dutton & Co., Inc.); RICHARD ELLMANN; JASON EPSTEIN (Random House); LAWRENCE FERLINGHETTI (City Lights Books); JOHN G. FULLER (Saturday Review); BERNARD GEIS (Bernard Geis Associates); MAXWELL GEISMAR; JACK GELBER; EMANUEL GELTMAN (The Free Press of Glencoe, Inc.); ARNOLD GINGRICH (Esquire); K. S. GINIGER (Hawthorne Books, Inc.); HERBERT GOLD; HARRY GOLDEN; MITCHELL GOODMAN; ROBERT GOTTLIEB (Simon & Schuster, Inc.); HOWARD GREENFELD (The Orion Press, Inc.); JOHN HOWARD GRIFFIN; RICHARD L. GROSSMAN (Grossman Publishers, Inc.); WILLIAM B. HARVEY (New York University Press); HIRAM HAYDN (Atheneum Publishers); HUGH M. HEFNER (Playboy); CHARLES A. S. HEINLE (Chilton Co., Book Division); JOSEPH HELLER; CECIL HEMLEY (The Noonday Press); JOHN HERSEY; GRANVILLE HICKS; LAWRENCE HILL (Hill & Wang, Inc.); WILLIAM HOGAN (San Francisco Chronicle); TAY HOHOFF (J. B. Lippincott Co.); JOHN CLELLON HOLMES; IRVING HOWE; B. W. HUEBSCH (The Viking Press, Inc.); RICHARD HUETT (Dell Publishing Co., Inc.); FRED JORDAN (Grove Press, Inc.); JACK KEROUAC; CHESTER KERR (Yale University Press); ROB-

ERT KIRSCH (Los Angeles Times); DONALD S. KLOPFER (Random House); HERMAN KOGAN (Chicago Daily News); JAMES LAUGHLIN (New Directions); JOHN T. LAWRENCE (William Morrow & Co., Inc.); SEYMOUR LAWRENCE (Atlantic Monthly Press); REGINA LEBOWITZ (Farrar, Straus & Cudahy, Inc.); MAX LERNER; FREEMAN LEWIS (Pocket Books, Inc.); R. W. B. LEWIS; ROBERT LOWELL; ROBERT M. MACGREGOR (New Directions); NORMAN MAILER; BERNARD MALAMUD; MARYA MANNES; KEN McCORMICK (Doubleday & Co., Inc.); CARSON McCULLERS; CAREY McWILLIAMS (The Nation); DANIEL MELCHER; THORPE MENN (Kansas City Star); PETER MICHELSON (Chicago Review); ERIC MOON (Library Journal); FREDERICK MORGAN (Hudson Review); TRUMAN NELSON; HOKE NORRIS (Chicago Sun-Times); THEODORE M. O'LEARY (Kansas City Star); NORMAN HOLMES PEARSON; ARTHUR PELL (Liveright Publishing Corp.); BERNARD B. PERRY (Indiana University Press); ROBERT PHELPS (George Braziller, Inc.); WILLIAM PHILLIPS; SAMUEL H. POST (Belmont Books); LAWRENCE CLARK POWELL; BEN RAEBURN (Horizon Press, Inc.); HENRY RAGO (Poetry); THEODORE REIK; ELMER RICE; HAROLD ROBBINS; HENRY ROBBINS (The Dial Press, Inc); PAUL H. ROHMANN (Antioch Review); BARNEY ROSSET (Grove Press, Inc.); HOWARD W. SAMS (The Bobbs-Merrill Co., Inc.); MARK SCHORER; WEBSTER SCHOTT (Kansas City Star); PETER SCHWED (Simon & Schuster, Inc.); WILLIAM R. SCOTT (William R. Scott, Inc.); EDWIN SEAVER (George Braziller, Inc.); RICHARD SEAVER (Grove Press, Inc.); ROD SERLING; KARL SHAPIRO; LEONARD SHATZKIN (The Crowell-Collier Publishing Co.); WILLIAM L. SHIRER; JAMES H. SILBERMAN (Random House); IRVING STONE; LYLE STUART (Lyle Stuart, Inc.); WILLIAM STYRON; AARON SUSSMAN (Sussman & Sugar, Inc.); ALAN SWALLOW (Alan Swallow, Publisher); RICHARD TAPLINGER (Taplinger Publishing Co., Inc.); LIONEL TRILLING; ARTHUR W. WANG (Hill & Wang, Inc.); HOWARD SAYRE WEAVER (Yale University Press); RICHARD WILBUR; JOHN C. WILLEY; DONALD A. WOLLHEIM (Ace Books, Inc.); WILLIAM A. WOOD (University of Chicago Press); THOMAS YOSELOFF (Thomas Yoseloff, Inc.).

AS AMICI CURIAE

INTEREST OF AMICI

Amici are more than one hundred authors, editors and publishers concerned that a bookseller can be put in threat of jail for his readiness to distribute a work such as *Tropic of Cancer*. We consider this incompatible with freedom of expression and the right to read. We ask that an end be put to the censorship of books.[1]

[1] Consent to the filing of this brief by *amici* was given by both parties. *Amici* earlier filed, with consent of both parties, a brief in support of the *Petition for Writ of Certiorari*.

ARGUMENT

I

There can be no blinking the fact that this nation has long endured a censorship of literature, generally administered through criminal proceedings, often prompted by civic and religious groups.[2] Though these have always been conducted under the banner of stamping out a traffic in worthless obscenity, much that has been banned has not been worthless or obscene. Much instead has found important place in the nation's literature and development of ideas.[3] That this should be is, of course, not new.[4]

Fifteen years ago, this Court last squarely faced the question whether a literary work of importance could constitutionally be suppressed by a criminal obscenity law; the Court's answer then was muted by its equally

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[2] See: Lockhart & McClure, "*Literature, the Law of Obscenity, and the Constitution*", 38 Minn. L. Rev. 295, 302-320, 334-374 (1954); Downs, *The First Freedom* (1960); Ehrlich, *Howl of the Censor* (1961); Haight, *Banned Books* (1955); Blanshard, *The Right to Read* (1955); de Grazia "*Obscenity and the Mail*", 20 Law & Contemp. 615 (1955); American Library Association, *The First Freedom* (1961); House Subcommittee on Postal Operations, 86th Cong. 1st Sess., "*Report to the Committee on Post Office and Civil Service*" at 29 ff. (1959). This Court's decisions in *Roth* and *Manual Enterprises*, op. cits. *infra* notes 6 and 7, did not end the censorship, as the case before it today amply demonstrates. See also the authorities cited *infra* note 15; Lockhart & McClure, op. cit. *infra* note 25 at 9 ff. (1960); and the many bookseller and library incidents currently reported in the *Newsletter on Intellectual Freedom* of the American Library Association and the *Freedom to Read Bulletin* of the American Book Publishers' Council.

[3] See the documentation offered by the authorities cited *supra* note 2. The authors, ancient and modern, foreign and American, are legion. It appears that few authors of major importance have escaped censorship.

[4] See Mill, J. S., *On Liberty*.

divided bench.[5] The 1956 dicta of *Roth* v. *United States*,[6] reiterated in the 1962 opinion of *Manual Enterprises, Inc.* v. *Day*,[7] pointed, however, to a freeing of any literature distinguishable from obscenity. What remains is to confirm this freedom[8] and point out the signs by which prosecutors and trial courts may distinguish protected matter, and be enabled to confine the penalties of obscenity laws to that which is worthless and obscene. If this be forthrightly done, literature in America will in fact be freed.[9]

Amici are aware that after Petitioner's conviction was upheld below and after this Court had issued a *writ of certiorari* in the case, the highest Court of California, in a civil proceeding, unanimously found *Tropic of Cancer* protected by the Constitution and not obscene. (*Zeitlin* v. *Arnebergh*, decided July 2,

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[5] *Doubleday* v. *New York*, 335 U. S. 848 (1948), involving Edmund Wilson's "*Memoirs of Hecate County.*"

[6] 354 U. S. 476.

[7] 370 U. S. 478.

[8] As was done in *Attorney General* v. *Book Named Tropic of Cancer*, 184 N.E. 2d 328 (1962); *McCauley* v. *Tropic of Cancer*, ... Wisc. 2d .... (1963); and *Zeitlin* v. *Arnebergh*, ... Cal. 2d .... (1963).

[9] Required is a candid rejection of the thesis that recognizable literature may be found obscene and on that basis banned. The qualified thesis would leave literature free unless its dissemination in a specific situation constituted an incitement or otherwise was intended or likely to cause damage or injury of a type which a State may validly control. The dissemination of worthless material, from which class would be excluded every recognizable piece of literature, every literature having importance for anyone, might be left punishable under the "prurient interest" and "patently offensive" tests. Cf. *Roth* v. *United States*, 354 U. S. 476, 494, 497, 511; *Manual Enterprises* v. *Day*, 370 U. S. 478; *Bantam Books* v. *Sullivan*, ... U. S. .... (1963); *Marcus* v. *Search Warrant*, 376 U. S. 717, 730; Kalven, "The Metaphysics of Obscenity," in *The Supreme Court Review*, 1, 13 (1960). See *infra* notes 26 and 42.

1963).[10] But *Amici* are aware too: that eight days thereafter the highest Court of the State of New York, in a criminal case, found the same book unprotected by the Constitution and obscene (*People* v. *Fritch*, decided July 10, 1963); that although the highest Courts of the States of Massachusetts[11] and Wisconsin,[12] as well as California, have also found the book constitutionally protected and not obscene, the book is barred from shipment to those States from New York;[13] that criminal proceedings presently pend against, and new ones threaten the publisher and its distributors in the City of New York,[14] as well as booksellers in other parts of the country;[15] that a warrant for the arrest

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[10] *Amici* understand that Respondent herein is seeking reconsideration of *Zeitlin* v. *Arnebergh* and may appeal to this Court in that case.

[11] *Attorney General* v. *Book Named Tropic of Cancer*, op. cit. *supra* note 8.

[12] *McCauley* v. *Tropic of Cancer*, op. cit. *supra* note 8.

[13] New York's criminal law, Section 1143, prohibits any deposit in the mails or other transporting of "obscene" matter. Since the highest court of the State of New York has declared *Tropic of Cancer* "obscene", any person who ships the book out-of-state becomes liable to arrest and prosecution.

[14] See Appendix I to this brief and notes 13 and 18.

[15] See the incidents of threats, prosecutions and suppression reported in the American Library Association's *Newsletter on Intellectual Freedom*, Vol. 10, No. 4 (January, 1962) through Vol. 12, No. 4 (July 1963). See also *New York Times Book Review* for January 21, 1962, at page 4: "The Most Recent Troubles of Tropic" by Anthony Lewis. There appear to have been 27 arrests in New Jersey alone. Other States include New York, Ohio, Minnesota, Indiana, Illinois, Colorado, Tennessee, Connecticut, Florida, Texas, Kentucky, Pennsylvania, Delaware, Washington, Oklahoma, Alabama, Iowa and Missouri. The most recent conviction occurred in Indianapolis, Indiana where Mr. Keith Cuffel, a divinity school graduate and manager of Curry's College Bookstore was found guilty of selling the book. See *Indianapolis Times* for June 14, 1963.

of the book's author, Henry Miller, has been issued;[16] and that the people of several,[17] and possibly all,[18] States are today being deprived of their rights to acquire and read this book.[19] In such extraordinary circumstances of nation-wide constitutional conflict, confusion and derogation, we submit it is an urgent duty of this Court now to free from threat of punishment, once and for all the nation, those involved in the creation and dissemination of *Tropic of Cancer*, and to announce, once and for all the nation, the right of the people to read this and any other work of literary, artistic or other import.[20]

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[16] See *New York Times* for Oct. 16, 1962 and Appendix I to this brief.

[17] See note 15 *supra*.

[18] The publisher, Grove Press, Inc. and its distributors are prohibited under New York law from shipping any copies from New York to bookdealers in any other State—including Massachusetts, Wisconsin, and California. See note 13 *supra*.

[19] But not only this book. For example, John Cleland's *Memoirs of a Woman of Pleasure* ("Fanny Hill") has now been banned in New York and thereby throughout the nation. See *New York Times* for July 25, 1963 (quoted *infra* note 30) and note 13 *supra*.

[20] It is noteworthy that in England, *Tropic of Cancer* was freed for all the nation by the Attorney General announcing he was not going to institute proceedings under the Obscene Publication Act of 1959 against the publishers, in respect of the book's pending publication. See *New York Times* for April 12, 1963, and *Appendix* II to this brief. Under the English law, literary merit is a defense to a charge of obscenity. *Ibid.* To remand this case without opinion on the strength of *Zeitlin* might free Petitioner but leave the author, his publisher, its distributors and bookdealers, throughout the nation, under continued threat of prosecution, and the people and the book perhaps "three-fiftieths" free. See notes 13, 16 and 18 *supra* and *Appendix* I. Because the Court in *People* v. *Fritch* (.... N. Y. 2d ...., decided July 2, 1963) remanded for a new trial on the *scienter* issue, the state-wide, possibly nation-wide, ban resulting could not be appealed from to this Court. See *infra* note 30.

The degree to which the *Roth-Manual Enterprises* tests can be applied in the censorship of literary expression is no longer subject to conjecture. Though these tests were fashioned by this Court to insure "the door barring federal and state intrusion" could be opened "only the slightest crack," lower courts have readily managed to plant their feet in that door while one of the highest courts in the land has now inserted head and shoulders. Despite the evident facts that three other State high courts had reached a diametrically opposed decision,[21] over one million Americans had long before purchased the book,[22] and critics nation-wide and world-wide had testified to its importance,[23] the New York Court of Appeals found *Tropic*

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[21] All three cases were mentioned by the dissenting judges.

[22] By April, 1962, some 1,100,000 copies had been reported sold. See *Herald Tribune Book Section* for April 29, 1962, at page 3. The work appeared on the *N. Y. Times* national best-seller lists from August 27, 1961, through December 3, 1961.

[23] Among these were: Karl Shapiro, Norman Cousins, Wallace Fowlie (*Age of Surrealism*, 1950), Lawrence Durrell, George Orwell (Inside the White Whale and Other Essays, 1940), Charles Glicksberg, Osbert Sitwell, Sir Herbert Read, Dorothy Parker, Edmund Wilson ("Twilight of the Expatriates" in *The Shores of Light*, 1952), John Ciardi, Horace Gregory, Philip Rahv, William Carlos Williams, T. S. Eliot, Harry T. Moore, Ben Ray Redman, Eric Moon, and Anais Nin. The published work itself contained assignments of importance by Miss Nin and Mr. Shapiro (in the *Preface* and *Introduction* respectively). Among the journals which prominently reviewed the work were the *New York Times*, *New York Herald Tribune*, *New York Post*, *Saturday Review of Literature*, *Library Journal*, *Milwaukee Journal*, *Esquire* and *The Nation*. See Appendix I of *Petition for Writ of Certiorari* herein. The work had been published in France (1934), Czechoslovakia (1938), Germany (1952), Denmark (1953), Japan (1954), Sweden (1955), United States (1961), Italy (1962) and Israel (1962). Consult:

of Cancer obscene and, worse, hard-core pornography. Thus did it, though situated in the heartland of American publishing,[24] not only broadcast the infirmity of the *Roth-Manual Enterprises* obscenity tests, but also forecast the futility of any attempted tightening of those tests which would rely on the notion of "hard-core pornography". Notwithstanding its auspicies,[25] any such revision, it is already apparent, would

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Perles, *My Friend Henry Miller* (1956); University of California at Los Angeles, Special Collections, *Henry Miller Collection: Apostles on Appeal*, Docket No. 13227, *Besig* v. *United States*, 208 F. 2d 142 (C.A. 9, 1953) reprinting reviews from such journals as: *La Marseillaise*, Paris, Sept. 12, 1946; *New English Weekly*, London, Dec. 19, 1946; *New Statesman and Nation*, London, February 1, 1937; *Le Petit Marocain*, Casablanca, December 30, 1947; *Soviet Literature Monthly* #6, 1950; Paris Edition, *New York Herald Tribune*, October 24, 1946; *New Republic*, April 21, 1941; *Vogue*, October 1, 1943; *Mademoiselle*, August 1944; *Time*, December 24, 1945; *Alumni Magazine, Dartmouth*, April 1943; Harpers, April 1949, *Revue Litteraire Mensuelle*, Nos. 5 and 6, 1943, Tunis (1949-51); *Algemeen Handelsblad*, Amsterdan, July 15, 1951; *Yale Review*, Spring 1951.

[24] When the New York Court of Appeals misapplies the *Roth-Manual Enterprises* tests to find a work of literature obscene, all the nation's access to the work is endangered. See notes 13, 18 and 19, *supra*.

[25] See Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 19, 58-68 (1960); Kronhausen, *Pornography and the Law* (1959) at 18; *Zeitlin* v. *Arnebergh* op. cit. *supra* note 8; *McCauley* v. *Tropic of Cancer*, op. cit. *supra* note 8; *Attorney General* v. *Book Named Tropic of Cancer*, op. cit. *supra* note 8; cf. *Roth* v. *United States*, *supra* note 6 at 507; *Manual Enterprises* v. *Day*, *supra* note 7. Professor Harry Kalven's emphasis on the "worthless" seems the sounder approach: "the obscene can include only that which is worthless." Op. cit. *supra* note 9 at 13. Even "pornographic" comic booklets may convey crude political ideas. See de Grazia, op. cit. *supra* note 2 at footnote 30. The "Gathings Committee" in 1952 found most paper-back books being sold at drugstores and newsstands "pornographic." *Ibid* at page 616.

also fail to frustrate those dedicated to finding even important literature obscene and to maintaining the censorship over books.[26]

II

The fault of *Roth-Manual Enterprises* is their permitting a court, as in the case below, to subject even a work having evident literary importance to the tests prescribed for the suppression of the worthless obscene. With respect to recognizable works of literature and art, however they may be concerned with

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[26] Literary and artistic expression, if it is to be free, simply cannot be tethered to the prurient interests of average men or to notions like "obscenity" or "pornography" which inevitably confound objective judgments—whether applied by juries, trial judges, or the benches of our highest courts. If there is to be constitutionally permissible culpability for uttering "obscene" matter, the issue should be drawn around the defendant's particular conduct in a particular situation. Cf. *Roth* v. *United States*, *supra* at 495, 497 and 511. This seems to have been the sense of the oft-cited dicta in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, where epithets were in mind, and the first of Chafee's "real or supposed social injuries" attributable to obscenity, i.e., "offensiveness, which links indecency to profanity and public drunkedness." *Government and Mass Communications* at 211. The A. L. I. was concerned that "there would be no public display to shock people of stricter propriety." Model Penal Code § 207.10 (Tent. Draft No. 6, 1957) *Comments* at page 13. Compare: *Winters* v. *New York*, 333 U. S. 507, 515 (1948) ("acts of gross and open indecency or obscenity"). This Court in *Manual Enterprises* v. *The Day*, op. cit. *supra* note 7, also suggested that material which merely "stimulates impure desires relating to sex" cannot be suppressed, and that a condemnation as obscene might require indecency amounting to visual assault. Much the same theory, that criminal prosecution for obscenity should be limited to obscenity in the nature of an epithet, an insult, or an assault was advanced by the Solicitor General of the United States in defending the federal statute against *Roth's* challenge to its constitutionality. See *Brief for the United States* at pages 34-42.

portrayals of sex,[27] those tests cannot apply. Such expression must be afforded the full protection of the guarantees, and be enjoined or penalized only under conditions of a sort which otherwise justify specific abridgements of the freedoms of speech and press.

Literature and art, no less than motion pictures, are paramount means for the circulation of ideas and for the carrying-out of this nation's deepest dialogue.[28]

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[27] *Roth v. United States*, *supra* note 6. The sexual aspect has been responsible for by far the greater part of all censorship of literature and art, perhaps because of the deep-seated connections between religion, sex and art. It appears to have been no accident that the first case to have recognized the crime of "obscene libel" involved a work called "Venus in the Cloister or the Nun in her Smock"—*Curl's Case* (1727) 2 Stra. 788; See St. John-Stevas, *Obscenity and the Law* (1956) at 23 ff.; Schroeder, *Obscene Literature and Constitutional Law* (1937) at 371 ff.; cf. Cornford, *The Origin of Attic Comedy* (1961); Kaplan, *"Obscenity as an Esthetic Category,"* 20 Law & Contemp. 544 (1955); Goodman, *"Pornography, Art & Censorship,"* in *Commentary* (March, 1961) at 203-212.

[28] Cf. *Zeitlin* v. *Arnebergh*, *supra* note 8. The philosophical and psychological support for this proposition is extensive. See, e.g., Dewey, *the Public and Its Problems* (1946), especially pages 163, 183-184; Dewey, *Freedom and Culture* (1939), especially pages 9-10; Freud, *Gesammelte Schriften* (1940-1952), Vol. I, 227, Vol. VII, 33, 70, XIV, 399, 495, quoted in Jones, *The Life and Work of Sigmund Freud*, Vol. III, 418-420 (1957), McKeon, Merton & Gelhorn, *The Freedom to Read* (1957); Lockhart & McClure, *"Literature, The Law of Obscenity, and the Constitution,"* 38 Minn. L. Rev. 295, 368-373 (1954); Kaplan, *"Obscenity as an Esthetic Category,"* 20 Law & Contemp. 556-559 (1955); Goodman, "Pornography, Art & Censorship" in *Commentary* (March, 1960) at 203-212; Kalvin, op. cit. *supra* note 9 at 16 (1960); Meiklejohn, "The First Amendment is an Absolute" in *The Supreme Court Review* (1961) at 245, 257, 262-263; Kallen, "The Ethical Aspects of Censorship" in *Social Meaning of Legal Concepts* No. 5, N.Y.U. School of Law (1953) at 34-71; Conant, *Address to the Modern Language Association* (1940).

Only by affording the widest possible public access to them will the historic function of freedom of expression be fulfilled. The application of criminal obscenity laws against recognizable works of literature and art can only subvert this function. Even were there not ample testimony of the invidious effect such censorship has on creative effort,[29] one would need be insensible to the reality of human conduct to imagine authors, editors, publishers and the others concerned with the private and public dissemination of books, remain unaffected by such prosecutions. So is it everywhere understood that obscene literature prosecutions are directed almost never at incarcerating a culpable vendor, but almost always at intimidating every distributor.[30]

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[29] Lockhart & McClure, *op. cit. supra* note 2 at 372-73; Kallen *op. cit. supra* note 28. Compare: "The greatest harm done is to those who are not heretics, and whose whole mental development is cramped, and their reason carved, by the fear of heresy. Who can compute what the world loses in the multitude of promising intellects combined with timid characters, who dare not follow out any bold, vigorous independent train of thought, lest it should land them in something which would admit of being considered irreligious or immoral?" (Mill, J. S., *On Liberty*) (Or obscene!)

[30] See Lockhart & McClure, op. cit. *supra* note 25 at 11 (1960); see also the *New York Times* for July 11, 1963, reporting on the *Tropic of Cancer* decision in *People* v. *Fritch*, *supra*: "As a result of today's decision, the sale, advertising, gift, loan or distribution of the book, or its possession with the intent of doing these things, constitutes a misdemeanor." Cf. the *New York Times* for July 25, 1963, reporting on a State Supreme Court ruling that John Cleland's *Memoirs of a Woman of Pleasure* published by G. P. Putnam's Sons was obscene: "Under the ruling, the sale of the book in the State is illegal . . . Anyone selling 'Fanny Hill' could be held in contempt of Court and be liable to a 30-day jail sentence or a fine." These effects *are* censorship. Significantly, they follow even though "scienter" may *never* be shown. See note 20 *supra*. This seems not to have been noticed by commentators on *Smith* v. *California*, 361 U.S. 147, including Kalven, op. cit. *supra* note 9 at 37.

and librarian[31] within reach of the prosecuting authorities' process, into suppressing the work and any others like it.

If, then, book censorship is to be eliminated, whenever a court is confronted with a recognizable work of literature or art the *Roth-Manual Enterprises* tests cannot apply. Thus, although worthless utterances might validly have their "obscenity" tested by local standards of decency, wherever a protected work is challenged, only national constitutional standards can apply.[32] These ought embrace nothing less than the right of every adult person, whatever the State in which he may reside, to read the literature and view the art of his choice,[33] thereby to gain exposure to the

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[31] See, for example, the *Statement* of Emerson Greenaway, Director, the Free Library of Philadelphia, on December 1, 1961, reported in American Book Publishers Council, *Freedom to Read Bulletin*, December 8, 1961: "As Director of the Free Library, I am now forced to order all Free Library copies of Henry Miller's *Tropic of Cancer* withdrawn from circulation"; and this and other instances of library censorship reported in the American Library Association's *Newsletter on Intellectual Freedom* for April, 1962.

[32] If freedom to read is a right protected by the First Amendment (Cf. *Smith* v. *California*, 361 U. S. 147, 153) it is a right of all citizens irrespective of the State in which they reside, the States are forbidden from abridging it, as they are forbidden uniformly from abridging their citizens' right to assemble or petition—by operation of the "privileges and immunities" clause, if not the "due process" clause, of the Fourteenth Amendment. See Crosskey, *Politics and the Constitution*, Vol. II at 1094-5 (1953); Compare: Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, *supra* note 28 at 110-114.

[33] See: National Council of Teachers of English, *The Students Right to Read* (1962) at 8; compare: the statement attributed to *Las Vegas Sun* Editor, Hank Greenspun, regarding a *Tropic of Cancer* bookseller's arrest: "We never dreamed the police would get into it . . . It is my feeling that before anything is banned

widest range of ideas communicable through those forms. Further, just as no local authority could validly suppress within its jurisdiction ideas and information freely circulated within another, so ought every authority give credit to the findings of other authorities—whether private or governmental, in State or out—that a work, having some redeeming importance, is to be accorded constitutional protection.[34] The issue cannot turn on *who* may find a work important or *where* it may so be found, but simply on *whether* anyone, anywhere finds it to have a worth.

III

In the case at hand, such findings abounded. Not only was it known to the courts below (as to Petitioner) that federal authorities had determined the

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through censorship, it should be read by the censor and if the censor can stand it, so can I''; reported in American Library Association *Newsletter on Intellectual Freedom* for May 1963; *McCauley* v. *Tropic of Cancer*, op. cit. *supra* note 8; ''An offended reader need only close it in order to escape''; cf. *Butler* v. *Michigan*, 352 U. S. 380.

[34] This is the reverse side of the medal of ''*scienter*''. Wherever such findings anywhere are known to exist, the possibility of *scienter* must be excluded. As suggested by Judge Dye, dissenting in *People* v. *Fritch*, *supra:* ''In truth, it is doubtful whether *scienter* can ever be proven in view of other States.'' (Citing the Massachusetts, Wisconsin and California courts holding *Tropic of Cancer* constitutionally protected and not obscene.) Of course, an awareness of the existence of ''adverse'' findings (i.e., findings of worthlessness or ''obscenity'') cannot be understood to impute *scienter*, unless those findings are unanimous or exclusive. Otherwise a single adverse ruling could blanket a State or the nation with censorship. See notes 20 and 30 *supra*.

work could no longer be held obscene,[35] but it was also evident the work was now, as it had been many years before, the subject of critical comment and public discussion,[36] and was, moreover, freely being distributed in other counties[37] and states.[38] Whenever a challenged work is shown either to have secured critical attention in newspapers or journals concerned with such things, or to have been examined and found unsuppressable as obscene in any other locale or jurisdiction in the nation, or to have literary, artistic, scientific, political or other importance for persons prepared so to declare in open court, then it should be the plain duty of a prosecutor or judge to dismiss the criminal proceedings—at least in the absence of a charge of intent to engender specific harm. For no findings of worthlessness can survive where persons have publicly declared or are prepared in court to declare that a worth exists for them.[39] And no city or State may hold its resi-

[35] See Appendices E and F of *Petition for Writ of Certiorari* herein. Compare with *Brief for the United States* (filed in *Roth* v. *United States*, *supra* note 6) at pages 29, 35.

[36] See, for example, the authorities cited *supra* note 22. Of course, a number of witnesses also appeared and testified for and against the book's importance. Such court-room testimony should be considered unnecessary whenever it can be judicially noticed or established by other means that the book cannot be found worthless because it has evident importance for some.

[37] Prior to Petitioner's conviction, booksellers in Marin County, California, for example, had been acquitted and were known to be selling the work. See *Zeitlin* v. *Arnebergh*, *supra* note 8 at fn. 1.

[38] The book was generally available at public libraries in California and throughout the nation. See *Library Journal*, Vol. 88, No. 3 (Feb. 1, 1963) at 501, 503-04; ALA *Newsletter on Intellectual Freedom* for April, 1962 (Vol. 11, No. 1); and note 22 *supra*.

[39] "If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind." Mill, J.S., *On Liberty*.

dents down to a lesser freedom of expression, a smaller right to read, than any other city or state, or the nation.

Criminal prosecutions for obscenity are poor forums for debates over the importance of a work of literature of art.[40] Once a recognizable work is involved, every attempt by judge or jury, with or without the assistance of experts, to measure the work's obscenity or its social importance, simply mocks the constitutional tradition.

IV

The permissible juridical suppression of obscenity must begin and end with the worthless.[41] Criminal prosecutions for obscenity should once more become means for ascertaining the guilt of persons charged with assaulting the sexual sensibilities of others through univited[42] utterances neither designed nor likely to convey any idea or information having the slightest social importance. This seems to have been the original confine, and is certainly a proper confine, for obscenity laws. Permitted application to

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[40] *In rem* proceedings such as were undertaken in *McCauley* v. *Tropic* and *Attorney General* v. *Book Named Tropic of Cancer*, op. cit. *supra* note 8, or bookseller-plaintiff actions such as were undertaken in *Zeitlin* v. *Arnebergh*, *Ibid*, seem to elicit better results in a less barbaric climate, but contribute little more to the "debate" and, at least in the case of the *in rem* proceeding, also invite censorship. (Contra?: *Kingsley Books* v. *Brown*, 354 U. S. 436.) The "Fanny Hill" suppression cited *supra* note 30 was effected *in rem*.

[41] Kalven, op. cit. *supra* note 9 at 13

[42] The "uninvited" quality of condemnable "obscenity" is related to the "offensive" aspect noticed in *Manual Enterprises* and to the "expletive" or "assaultive" quality which appeared as the basis of the early common law offense. See St. John-Stevas, op. cit. *supra* note 27; *Sidley's Case*, 1 Sid. 168 (1663). And see the authorities cited *supra* note 26. This might well be controlled by governmental authority without any significant interference with freedom of expression, any censorship of literature or art.

literature and art, or to motion pictures,[43] such a law must always become a mechanism for censorship, for the deliberate suppression of ideas about sex and other things in disfavor with those in authority or those close to authority.

CONCLUSION

The judgment of the Court below should be reversed. The *Roth-Manual Enterprises* rules for the testing of expression should be qualified so as to remove all threat to any not worthless, and permit no finding of worthlessness where there are persons to assert its worth.

Respectfully submitted,

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Washington 36, D. C.

Of Counsel:

DE GRAZIA, AGGER & HYPEMAN
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[43] As in *Jacobellis* v. *Ohio*, No. 164. It seems clear the jury should not and cannot any longer be relied upon to regulate the freedom to express ideas on sexual or other "vital problems of human interest and public concern". Cf. Lockhart & McClure, op. cit. *supra* note 25 at 114-120. To do so would leave no room for innovation, for new or old ideas unacceptable to the average man. This Court must push beyond the 1913 frontier of *United States* v. *Kennerley*, 209 Fed. 119 (S.D.N.Y. 1913) and hold that: "to put thought in leash to the average conscience of the time is *not* tolerable". Neither should it be leashed to the views of the *literati* except to the extent available to "qualify" for constitutional protection (i.e., remove from the class of "worthless") works having any literary importance, as scientists would "qualify" works having any scientific importance, though challenged as "obscene", as were, for example, works by Freud, Kraft-Ebbing, Steckel, Margaret Mead and Simone de Beauvoir. See de Grazia, op. cit. *supra* note 2 at 615.

APPENDIX I

(Copy)

CRIMINAL COURT OF THE CITY OF NEW YORK
KINGS COUNTY

COURT OF SPECIAL SESSIONS
THE CITY OF NEW YORK
BOROUGH OF BROOKLYN

THE PEOPLE OF THE STATE OF NEW YORK, *Plaintiffs*
against
HENRY MILLER, Imperial News Co. Inc., BARNEY ROSSET, Brooklyn News Co. Inc., GROVE PRESS INC., Pacific News Co. Inc., *Defendants*

THE DISTRICT ATTORNEY OF THE COUNTY OF KINGS, by this information accuses the defendants of the crime of OBSCENE PRINTS AND ARTICLES IN VIOLATION OF SECTION 1141 OF THE PENAL LAW, committed as follows:

The defendants, on or about and between January 1, 1961 and June 30, 1962, in the County of Kings, unlawfully sold, loaned, gave away, distributed, showed and transmutted, and offered to sell, lend, give away, distribute, show and transmute, and had in their possession with intent to sell, lend, distribute, give away, show and transmute, and advertise, and offered for loan, gift, sale and distribution, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, and written and printed matter entitled "HENRY MILLER, TROPIC OF CANCER" and bearing on its cover the legends "A BLACK CAT BOOK 95¢", "THIS IS THE COMPLETE UNEXPURGATED GROVE PRESS EDITION ORIGINALLY PUBLISHED AT $7.50" which book and printed matter was copyrighted in 1961 by Grove Press, Inc. and is captioned "FIRST BLACK CAT EDITION 1961—THIRD PRINTING—MANUFACTURED IN THE UNITED STATES OF AMERICA", and which book and printed matter depicts and represents acts and scenes wherein the sexual organs of both male persons and female persons are portrayed and described in manners connoting sex degeneracy and

sex perversion, and which acts, scenes and descriptions were of such a pornographic character as tend to incite lecherous thoughts and desires; and the defendants designed, copied, drew, printed, uttered and published, and manufactured and prepared said book and printed matter, and wrote, printed, published and uttered, and caused to be written, printed, published and uttered, an advertisement and notice giving information, directly and indirectly, stating and purporting so to do, where, how, and whom, and by what means and what purports to be, the said obscene, lewd, lascivious, filthy, disgusting and indecent book and printed matter can be purchased, obtained and had.

(Blank Form)

COURT OF SPECIAL SESSIONS
THE CITY OF NEW YORK
BOROUGH OF BROOKLYN

THE PEOPLE OF THE STATE OF NEW YORK, *Plaintiffs*
against

Defendant

SECOND COUNT

THE DISTRICT ATTORNEY OF THE COUNTY OF KINGS, by this information accuses the defendant of the crime of CONSPIRACY, committed as follows:

The defendants, on or about and between January 1, 1961 and June 30, 1962, in the County of Kings, unlawfully and corruptly conspired, combined, confederated and agreed together to commit the crime of Obscene Prints and Articles in violation of Section 1141 of the Penal Law, under a certain scheme and plan whereby the defendant arranged to unlawfully sell, lend, give away, distribute, show and transmute, and to offer to sell, lend, give away, distribute, show and transmute, and to have in their possession with intent to sell, lend, distribute, give away, show

and transmute and to advertise, and offer for loan, gift, sale and distribution, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic, and disgusting book and written and printed matter entitled "HENRY MILLER, TROPIC OF CANCER" and bearing on its cover the legends "A BLACK CAT BOOK 95¢" This is the complete unexpurgated Grove Press edition originally published at $7.50", and which book and printed matter was to be copyrighted in 1961 by the defendant Grove Press, Inc. and was to bear the caption "FIRST BLACK CAT EDITION 1961—THIRD PRINTING—MANUFACTURED IN THE UNITED STATES OF AMERICA".

It was the plan of the said conspiracy that the said book and printed matter was to be prepared and authored by the defendant Henry Miller and was to depict and represent acts and scenes wherein the sexual organs of both male persons and female persons were to be portrayed and described in manners connoting sex degeneracy and sex perversion and were to be of such a pornographic character as would tend to incite lecherous thoughts and desires.

It was part of the plan of the said conspiracy that the defendants Grove Press, Inc., and Barney Rosset, was to print, publish and utter the said book and printed matter while the defendant IMPERIAL NEWS CO. INC., BROOKLYN NEWS CO. INC., PACIFIC NEWS CO. INC. were to act as distributors of the said book and printed matter.

It was part of the plan of the said conspiracy that the defendants were to design, copy, draw, print, utter and publish and manufacture and prepare said book and printed matter. It was part of the plan of the said conspiracy that the defendants were to write, print, publish and utter, and cause to be written, printed, published and uttered, an advertisement and notice giving information, directly and indirectly, stating and purporting so to do, where, how and whom and by what means and what purports to be, the said obscene, lewd, lascivious, filthy, dis-

gusting and indecent book and printed matter, can be purchased, obtained and had.

OVERT ACTS

1. In pursuance of said conspiracy, and to effect the purposes and objects thereof, the defendant Henry Miller, on or about and between January 1, 1961, and June 30, 1962, in the County of Kings, prepared and authored the said book and printed matter entitled "HENRY MILLER, TROPIC OF CANCER" and therein depicted and described acts and scenes wherein the sexual organs of both male persons and female persons were portrayed and represented in manners connoting sex degeneracy and sex perversion.

2. And in further pursuance of said conspiracy, and to effect the purposes and objects thereof, the defendant Grove Press, Inc., and Barney Rosset, on or about and between January 1, 1961 and June 30, 1962, in the County of Kings, printed, published and uttered the said book and printed matter.

3. And in furtherance of said conspiracy, and to effect the purposes and objects thereof, the defendants Imperial News Co. Inc., Brooklyn News Co., Inc., and Pacific News Co., Inc., in the County of Kings, distributed the said book and printed matter at various locations.

EDWARD S. SILVER
District Attorney

BROOKLYN, N. Y., OCTOBER 15, 1962

APPENDIV II*

DIRECTOR OF PUBLIC PROSECUTIONS
12 Buckingham Gate, London S.W.1
VICtoria 6912

Please quote: DD.356.63
Your reference: EG:gf

April 22, 1963

re Tropic of Cancer

Dear Sir,

There has been no official statement with regard to the above book except that the Attorney General has stated that he was not going to institute proceedings under the Obscene Publications Act 1959 against Messrs. Calder, the publishers, in respect of the impending publication of the above book.

The following considerations are material:—

Under the Obscene Publications Act the definition of obscenity is tied to the circumstances of a sale. Thus the sale of a book to a child might offend against the Act while the sale of the same book to an adult might not.

Accordingly a decision not to prosecute in order to prevent a book being published does not and cannot, preclude a subsequent prosecution if the particular circumstances of a sale are such as to justify a prosecution.

In this country criminal proceedings may be instituted by anyone.

Accordingly a decision by the Attorney General or the Director not to prosecute does not and cannot prevent the institution of criminal proceedings by any private person who feels aggrieved by the publication or sale of the book.

* Copy of letter addressed to Elmer Gertz, Esq., 120 South La Salle Street, Chicago 3, U.S.A.

The following are defences to charges against the Obscene Publications Act, (1) that the book was not obscene, (2) that its publication was justified as being in the public interest on the grounds of the book's literary merit.

The former is solely a question for the Court and no evidence may be called. "The book must speak for itself". But expert evidence may be called as to the book's literary merit.

Accordingly whether a prosecution is likely to succeed depends to a considerable extent on the quality of the evidence available as to the book having or not having substantial literary merit.

If when a book is about to be offered for sale criminal proceedings are instituted and an acquittal follows, the sale of the book is likely to be greatly increased.

Having regard to all these considerations the Director decided not to institute criminal proceedings at this stage.

I trust that these observations will be of assistance to you.

Yours sincerely,

Maurice Crump
(Maurice Crump)

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IN THE

Supreme Court of the United States

October Term, 1963

No. 72

BRADLEY REED SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

BRIEF FOR THE PETITIONER.

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Counsel for Petitioner.

Of Counsel:
SAM ROSENWEIN

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IN THE

Supreme Court of the United States

October Term, 1963

No. 72

BRADLEY REED SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

BRIEF FOR THE PETITIONER.

Opinion Below.

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles [R. 109-117][1] is unreported. For the convenience of the Court, a copy of the opinion is attached hereto as Appendix A.

[1]The reference "R" is to the certified record prepared by the Clerk of the court below, and now on file with this Court. A motion to dispense with the printing of the record is pending before the Court. A copy of the corresponding page references in the certified record for each volume of the Reporter's Transcript on Appeal below was furnished to counsel for respondent on August 12, 1963, prior to the filing of the brief herein.

Jurisdiction.

The judgment of the court below [R. 114] was dated and entered on October 24, 1962. On the same day, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles made and entered an order in the case entitled: Order Certifying Cause to District Court of Appeal [R. 118].

On November 15, 1962, the District Court of Appeal of the State of California for the Second Appellate District, Division Three, made and entered an order in the case entitled: Order Denying Transfer on Certification, one Judge voting to grant transfer [R. 119].

By the aforesaid denial of transfer, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles became the highest court of the State in which a decision could be had. Calif. Constitution, Article VI, Sections 4, 4b, 4e, 5; Calif. Penal Code 1471; Calif. Rules of Court, Appellate Rules, *Rules on Transfer of Municipal and Justice Court of Appeals*, Rule 61 *et seq.*; Calif. Rules of Court, Appellate Rules, Rules 24(a), 28(a), 28(b). *Smith v. California*, 361 U. S. 147, 148, fn. 2; *Virginia Ry. Co. v. Mullins*, 271 U. S. 220, 222.

By order of Mr. Justice Douglas dated January 11, 1963, the time to file a petition for a writ of certiorari was extended to and including February 13, 1963. The petition was timely filed and granted on April 29, 1963.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

Questions Presented.

1. Whether the sale of *Tropic of Cancer* by Henry Miller is not protected against criminal punishment by the guarantees of free expression afforded by the First and Fourteenth Amendments.

2. Whether California Penal Code, 311.2, as construed and applied to the sale of *Tropic of Cancer* by petitioner, deprives petitioner of liberty of speech and press without due process of law contrary to the free speech and press provisions of the First Amendment subsumed into the due process clause of the Fourteenth Amendment as a limitation on state action.

3. Whether California Penal Code 311.2, as construed and applied to the sale of *Tropic of Cancer* by petitioner, fails to provide reasonably ascertainable standards of guilt and therefore deprives petitioner of his liberty without due process of law contrary to the due process provision of the Fourteenth Amendment.

4. Whether California Penal Code 311.2, as construed and applied to punish the sale of *Tropic of Cancer* by petitioner because deemed to be utterly without redeeming social importance to the "average person" in the "Los Angeles community," abridges the freedoms of speech and press and deprives petitioner of his liberty without due process of law and denies petitioner the equal protection of the laws contrary to the free speech and press, due process and equal protection provisions of the First and Fourteenth Amendments.

5. Whether California Penal Code 311.2, as construed and applied to punish the sale of *Tropic of*

Cancer, the dominant theme of the said book, taken as a whole, not appealing to prurient interest nor going beyond contemporary standards in the description of sex, and believed by petitioner to have ideas of redeeming social importance and therefore not obscene, deprives petitioner of liberty of speech and press and permits petitioner's conviction without evidence of guilt contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

6. Whether the rulings and the instructions of the trial court, and refusal to instruct, with respect to the standards for judging the alleged obscenity of *Tropic of Cancer*, upheld by the court below, deprived petitioner of his liberty without due process of law contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States, and the provisions of California Penal Code 311 and 311.2 are set forth in Appendix B attached hereto.

Statement.

In a complaint [R. 2] filed in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, petitioner, a bookseller [R. 138-139] was charged with a violation of California Penal Code 311.2. It was alleged that on or about October 9, 1961 in the City and County of Los Angeles, the petitioner did knowingly exhibit and distribute "obscene matter, to wit: the book 'Tropic of Cancer,' by Henry Miller." The cause came on for trial before Honor-

able Kenneth L. Holaday, a Judge of the said Municipal Court, and a jury [R. 126, 138].

After the book was received in evidence [Peo. Ex. 4; R. 348], it was read to the jury [R. 367-379, 392-396, 413-415, 417-421].

The extensive trial thereafter was made up largely of testimony of witnesses offered by the People [R. 568, 660, 758, 800, 912, 951, 983, 1027, 1996, 2146, 2231, 2251, 2289, 2350, 2425, 2524, 2735] and by petitioner [R. 678, 860, 1081, 1108, 1160, 1276, 1304, 1364, 1460, 1589, 1613, 1648, 1725, 1744, 1930, 1940, 1944, 2565, 2683, 2780] with respect to whether or not the book was nonobscene and had redeeming social importance.

The trial court's views as to "the general rules in connection with expert witnesses in this type of case" [R. 513] were outlined to counsel prior to the testimony given by the witnesses. The trial court stated that a witness could testify as to the "ultimate conclusion" [R. 514] respecting the obscenity or nonobscenity of a writing only if the witness could also testify to circumstances demonstrating "what the common conscience of the community was and is, what the moral fiber of the community is" [R. 514].

The ultimate conclusion of obscenity or nonobscenity, in the opinion of the trial court, "is predicated upon what the average person in the community would feel towards a given writing" [R. 515], from which it followed that a basis had to be established from which the jury could infer that the expert witness "was familiar with the common conscience of the community" [R. 515]. The trial court stated that "the determination

of whether or not it has social importance would have to be based upon the common conscience of the community, that is the average person in the community" [R. 516].

The trial court stated that the state obscenity statute did not permit a qualified expert witness to testify who was only familiar with the common conscience of "New York" or "Philadelphia, Boston or Dallas, Texas" [R. 517]; that a witness could testify only if it were established "that he was familiar with the common conscience in this community" [R. 517]. The trial court stressed "that to have an intelligent basis upon which this social importance has to be measured, it would have to be by the average person exercising the common conscience in this community" [R. 518].

Throughout the trial, the witnesses were accordingly restricted to testifying whether or nor in their opinion *Tropic of Cancer* had any "social importance" to the "average person" in the "Los Angeles" community [R. 513-518, 601-602, 665-668, 673-675, 946, 994-996, 1023-1026, 1051-1052, 1198-1199, 1378-1379, 1500-1501, 1730-1737, 1961-1962, 1976-1977, 1990-1991, 2019, 2022-2032, 2034-2040, 2262-2267, 2294-2299, 2434-2444, 2494-2497, 2536-2538, 2637-2638, 2717-2719, 2742-2745, 2750-2753, 2803-2808].

When trial counsel for petitioner, dissenting from the views of the trial court, urged that "matters may be of extreme social importance which might never come to the attention of the average person" [R. 1024], the trial court replied: "The average person in this community would have to weigh the social importance, establishing first that it has social importance, and the test would be does the average person in this

community believe that it is excused, even though it does appeal to prurient interest" [R. 1025].

On this aspect of the case, the trial court merely instructed the jury that "to be of social importance the matter must be of value to society; thus a matter that is of no value to society is utterly without redeeming social importance" [R. 2821-2822]. The trial court refused to instruct the jury that the words "redeeming social importance" include, among other things, the literary or artistic value or merit of the book; include the theological, sociological, educational, or other social values of the writing; that offensiveness to the sensibilities of an individual, or even a substantial segment of the community was not sufficient to condemn the book; that the free speech provisions of the First Amendment permit wide varieties of taste and reject official norms; that the guarantees of the Constitution are not confined to the expression of ideas that are conventional or shared by a majority, and other instructions of a like character [R. 62, 64, 65, 74, 90-102, 103]. The trial court also refused to instruct the jury "that in applying contemporary standards to the book, you are not restricted to the City of Los Angeles nor even to the Los Angeles Metropolitan area" [R. 61].

Pursuant to the aforesaid strictures of the trial court, the prosecution witnesses testified that in their opinion, to the average person in the Los Angeles community, *Tropic of Cancer* is obscene and without redeeming social importance [R. 581-582, 763-764, 806-807, 915-916, 955-956, 988-989, 1030-1031, 2006, 2152-2153, 2235-2236, 2253-2254, 2295-2296, 2355-2356, 2430-2431, 2488-2489, 2531-2532, 2744-2745].

The witnesses for the petitioner testified that the book, to the average person, was not obscene and was a writing of social importance [R. 689-690, 861-862, 1111-1112, 1163-1164, 1281-1282, 1370-1372, 1464-1465, 1594-1595, 1619-1620, 1653-1654, 1933-1935, 1954-1955, 2571-2572, 2692-2693, 2784-2785].

The book was deemed to be of social importance by petitioner's witnesses because of "the power of its language, the fidelity of its description and the feeling for individual characters" [R. 740]; ". . . he [Miller] is trying to divest himself of the usual attitudes of good or bad or praise or blame and see the thing as it is" [R. 872]; ". . . tells us something about human beings, human experience" [R. 1116]; ". . . this book helps the average man or any man to admit to himself some of the features of his private life before they have been explained away" [R. 1172].

The witnesses for petitioner repeatedly stressed the social value of the ideas contained in *Tropic*. ". . . it has social redeeming graces, redeeming social importance, as a minister, saying this from the religious point of view, from the point of view of one looking insightfully into life and seeing meaning or non-meaning" [R. 1327]; ". . . work which comes in the tradition of the autobiography and the confession . . . tells us what the vision was of one man in one place at a certain time . . . criticism of the mores and morals and ideals of the society from which he came" [R. 1375-1377]; ". . . reminds him [the average person] that he does not have to be a victim of the machine, or of a mass society, that he is an individual, that he is entitled to his individual thoughts, his individual beliefs, his individual opinions" [R. 1467];

"Miller is not saying that you should all go to Paris and become artists and have mistresses and steal money and cadge and do whatever things he describes in this novel. What he is saying is that you do whatever is necessary for you to do in order to reach your full potentialities as an individual, and to understand that in order to be honest with anyone else, you have to be first honest with yourself and this is the first requirement for individuality and this is something that comes right through the American literary strain" [R. 1565-1566].

The witnesses for petitioner emphasized the literary values of *Tropic*. ". . . it is the literature of the large city, of the large metropolitan city—city life itself in all its variety . . ." [R. 1600]; ". . . writing this not so much as a man writing about something, but . . . writing as a man thinking about this . . . attempting to put down his perceptions, and thoughts and feelings" [R. 1621]; "I regard this work apart from the more serious part of the confessional part, a man discovering himself in our century, that I find this work one of the most hilarious books that I have read, as well. As baudy [sic] as Shakespeare" [R. 1672]; ". . . a book of an angry person . . . who feels somehow the pressures of culture and of society have drained meaning out of life at its deepest level; he is attempting . . . to redeem this . . . by tearing away some of the falseness that he sees in life, to try to say what is real in life" [R. 1935]; ". . . a healthy corrective to the glamorization of prostitution . . . to romantic illusions . . . not only the portrayal of beauty but the portrayal of the worst that man has known so that all

men can find themselves and their proper role and a confirmation of their best values through the book" [R. 1966].

The witnesses for petitioner testified to the insights which the book has to offer. ". . . the ironies and difficulties of the human condition . . . the simple aloneness and acceptance of life . . . a book about the worth of the individual" [R. 2574-2575, 2578]; ". . . unwavering honesty . . . makes us realize what a really tough problem we all have, and we all would be aware of, if we could, in trying to find a foundation for our lives, trying to find some-meaning in it, some values, some kind of purpose . . . socially important in our society to be able to face even an objectionable point of view" [R. 2694-2696, 2698]; ". . . a significant work of art . . . he [Miller] is a serious artist, a dedicated artist . . . a social critic depicting with realism a tragic evil . . . as a great work of art, it [Tropic] can be an agency for reconciling people" [R. 2787-2790].

Petitioner, testifying in his own behalf, stated that he believed that the book had ideas of social importance, that the writing was not utterly without redeeming social importance, and was therefore not obscene under the law [R. 230-231, 352, 397, 402, 1081-1083, 1751-1768, 1775-1781, 1790-1812, 1814-1818, 1819-1907, 1907-1923, 1923-1927]. The trial court declined to give proposed instructions by petitioner on this issue of intent [R. 63, 77, 78].

The trial court instructed the jury that the test is not whether the "so-called wordly-wise and sophisticated" would come to the conclusion that the book has

social importance or that its predominant appeal was not to a shameful or morbid interest in sex nor go beyond customary limits of candor [R. 2822]. ". . . you determine its impact upon the average person in the community" [R. 2822]. The trial court stated: "You may ask yourselves, does it offend the common conscience of the community by present-day standards and is it matter which is utterly without redeeming social importance" [R. 2823].

The jury returned a verdict of guilty [R. 106]. The judgment and order of the trial court was probation for a period of one year, the first 30 days of the probationary term to be served in the city jail [R. 30]. The appeal to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles followed.

The aforesaid court below affirmed the judgment of conviction [R. 114]. The court rejected petitioner's argument that "the book 'cannot constitutionally be held obscene' under the state statute 'in light of the guarantees' of the United States and California Constitutions" (App. A, p. 1).[2] The Appellate Department held that the trial court had properly instructed the jury on the meaning of obscenity "as determined by the California and United States Supreme Courts" (App. A, p. 2).

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[2]On July 2, 1963, the California Supreme Court held that the book is not "obscene" *Zeitlin v. Arneberg*, 59 A. C. 930, ... P. 2d ....., 31 Cal. Rptr. 800. A petition for rehearing was subsequently denied. Counsel for petitioner here has been informed by William E. Doran, Deputy City Attorney, one of the attorneys for respondent in *Zeitlin*, that review by this Court will be sought either by way of a petition for a writ of certiorari or by appeal. Following the California decision in *Zeitlin*, the New York Court of Appeals on July 10, 1963 in a divided opinion held that *Tropic of Cancer* is "hard core pornography." *People v. Fritch*, ... N. Y. 2d ....., ... N. E. 2d .....

Referring to this Court's opinions in *Times Film Corp., Sunshine Book Co., One, Inc., Kingsley* and *Manual Enterprises, Inc.*, cited by petitioner, the court below held that these decisions "do not support the thesis that independent judicial judgment on review is ***required***, although, of course, it may be practiced" (App. A, p. 4). The court below held that *Tropic of Cancer* has not "the slightest tendency to show some social importance" and "lacks anything in the slightest redeeming" (App. A, p. 6).

The court below held that the jury had "impliedly found" that the book was "utterly without redeeming social importance", a finding allegedly supported by the evidence, and like any other "issue of fact", not to be disturbed on appeal (App. A, p. 2). "We believe that juries are composed of average persons" (App. A, p. 3). The court below further stated that to disturb the verdict of the jury would nullify "the People's right of trial by jury" (App. A, p. 7), and require the court to substitute its own "independent judgment in favor of the free speech and press guarantee, which we do not" (App. A, p. 6).

ARGUMENT.

Summary of Argument.

Tropic of Cancer by Henry Miller may not constitutionally be held "obscene". Accordingly, its sale and distribution are protected from state interference by the First and Fourteenth Amendments to the Constitution of the United States. The First Amendment's basic guarantee of freedom of expression includes all ideas, even if they test the conventions of the day. For this reason, the First Amendment protects literature and the arts because they serve as vehicles for the conveyance of ideas. The function of literature is to interpret, criticize, innovate, mirror, intensify, clarify and experiment—to challenge and stimulate persons to think. While this Court has held that "obscenity" is not protected expression, the Court has emphasized that there is no state power to restrict the dissemination of books which are not obscene.

Measured by constitutional standards enumerated by this Court, *Tropic of Cancer* is entitled to the First Amendment's protections. It is a serious work of literature, expresses ideas, and occupies an important position in twentieth century literature. The book has been published in many countries of the world, and a host of eminent American and world figures have attested to its literary and social importance. The Federal Government has implicitly conceded that *Tropic* is constitutionally protected, and the book circulates freely through the mails and through customs.

The book was published in this country by Grove Press, Inc., a reputable publisher whose book list includes many distinguished writers and serious works.

Tropic has been distributed with decorous advertising devoted solely to its literary merits. When *Tropic* was published in 1961, the reviewers and critics throughout the country were substantially agreed on the importance of the work. The consensus appeared to be that the book was written with serious and honest intent, that the work was of great literary significance, and that the writing contained challenging ideas vital for consideration in the modern world.

The petition for a writ of certiorari filed in this case contains a review of the literary traditions, the nature and character of the arts and the philosophy which permeated the first half of the twentieth century, out of which the book, *Tropic of Cancer*, and its author, emerged. There is also contained therein a somewhat extended analysis of the book's artistic and ideological form and content. The brief here sets forth in summary the material there presented. Henry Miller is a voice in the traditions of both the old and new world. Miller's book, *Tropic of Cancer*, reflects the concern of such early American writers, as Thoreau and Whitman, for self-liberation, the search for significant experience, the quest for self-identity. His writing reflects also the new literary forms in art and literature evidenced in the writings of James Joyce and Virginia Woolf, as well as those of the surrealist and Dada schools. These traditions manifest themselves in stream-of-conscience techniques and psychological investigations of the inner world of man. *Tropic of Cancer* is a search by an individual torn between his personal plight and his aspirations for a way to live in society. The anxieties and dilemmas of modern man in quest for a personal reality is one of the principal

social issues of the day. Almost all critics have defended Miller's use of explicit language as essential to his writing, as honest, artistically necessary, realistic and valuable.

Henry Miller is a member of the National Institute of Arts and Letters, an organization incorporated by Act of Congress and dedicated to the furtherance of literature and the fine arts. The membership of the Institute is limited to 250 citizens qualified by notable achievements in art, literature or music. *Tropic* was Miller's first published work. Since 1934, he has written over 30 books and a score of brochures, pamphlets and miscellaneous material. Miller's critics have come to recognize that Miller's works create a new and optimistic image of twentieth century man. There is a growing realization among those who read Miller's works with critical perception that his writings have an organic unity and substance, that what ultimately derives from Miller's works is a sense of devotion and dedication to self in the service of humanity, to a body of artistic and personal ideals flowing from a particular constellation of talents and compulsions, and that Miller reflects, in a very real and vital way, the history of the age.

Tropic of Cancer by Henry Miller, therefore, is entitled to the protections of the First and Fourteenth Amendments because it is a genuine work of literature which expresses ideas and has an important position in the history and development of literature.

The standards employed by the courts below for judging the alleged obscenity of *Tropic* are unconstitutional. The trial court, upheld by the court below, restricted the witnesses to testify whether or not in their

opinion *Tropic of Cancer* had any value to the "average person" in the "Los Angeles community." A rule of law which provides that a book in the United States can be suppressed if the average person in a local community deems it to be without social importance would reduce the expression of ideas to those that are conventional or shared by a majority, and this Court has repeatedly declared that such a legal rule is contrary to the First Amendment. A standard which permits suppression of books because the average person in a local community deems them socially unimportant is not only unconstitutional but manifestly capricious and socially harmful.

The trial court, again upheld by the court below, also restricted proof with respect to the essential ingredients of the offense to the geographical standards of the Los Angeles community. It is submitted that only a national standard for judging the obscenity of a writing is compatible with the First Amendment requirements, and that the standards of particular state and local communities cannot be constitutionally applicable.

Measured by constitutional standards, *Tropic of Cancer* does not appeal to the prurient interest nor go substantially beyond limits of candor in description of sex in literature. Since this issue involves factual matters entangled in a constitutional claim, the issue is ultimately one for this Court to decide. The dominant theme of *Tropic* appeals to the literary and intellectual interest of the average reader; it does not appeal to a morbid and shameful interest in sex. Nor does the language and sexual language found in *Tropic*, essential and integral to the writing, violate contemporary standards for literature.

Since the Court has coupled this case and the case of *Jacobellis v. Ohio* for argument, and since both cases involve problems with respect to the use of appropriate standards to assure constitutional protection for freedom of expression, counsel for petitioner briefly discusses the need for re-examination of the basis of the decisions of the Court in the "obscenity" area. Upon critical examination and in the light of the actual workings of the standards enunciated by the Court, it would appear, it is respectfully submitted, that there is need for reconsideration, and that books and other media of communication dealing with sex should have the same rights and be subject to the same limitations which are accredited all other expressions under the Constitution of the United States and the decisions of this Court.

I.

The Book "Tropic of Cancer" by Henry Miller Is Constitutionally Protected Expression and the Provisions of the First and Fourteenth Amendments Safeguard the Sale and Distribution of the Writing Throughout the United States. Imposition of Criminal Sanctions Under the State Obscenity Law Upon Petitioner Herein Is Constitutionally Impermissible.

(a) This argument rests upon the assumption that "'the First Amendment's basic guarantee is of freedom to advocate ideas . . . the very heart of constitutionally protected liberty." *Kingsley International Pictures Corporation v. Regents*, 360 U. S. 684, 688. The Constitution protects expression without regard "to the truth, popularity, or social utility of the ideas and beliefs which are offered." *N. A. A. C. P. v. Button*, 371 U. S.

415, 445. Unless integrated with unlawful conduct, all ideas—"unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion"—have the full protection of the guaranties of the First Amendment. *Alberts v. California*, 354 U. S. 476, 484.[3]

Thus, this Court has held that it would be a complete repudiation of the philosophy of the Bill of Rights for a State to suppress "the dissemination of views because they are unpopular, annoying or distasteful." *Murdock v. Pennsylvania*, 319 U. S. 105, 116. The Court has stated: "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacement, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance." *Martin v. Struthers*, 319 U. S. 141, 143. The essential characteristic of liberties of speech and press is "that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed." *Cantwell v. Connecticut*, 310 U. S. 296, 310. The "very basis of a free society" is the right of expression "beyond the conventions of the day." Mr. Justice Frankfurter, concurring in *Hannegan v. Esquire*, 327 U. S. 146, 160.

The First Amendment protects literature and the arts because they serve as vehicles for the exposition of ideas, because they "lead the way toward sensitive and informed appreciation and response to the values

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[3]In *Alberts*, a majority of this Court also rejected the argument that there is greater latitude for state action under the word "liberty" under the Fourteenth Amendment than is allowed to Congress by the language of the First Amendment. 354 U. S. at 492, n. 31. See also, *March v. Alabama*, 326 U. S. 501, 511.

out of which the riches of the general welfare are created". Meikeljohn, *The First Amendment is an Absolute*, Supreme Court Review, 245, 257, 262-263 (1961). See, *Alberts v. California*, 354 U. S. 476, 484, 487-488; Lockhart and McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 368-373 (1954). See also, 5 Social Meaning of Legal Concepts, 34, 36 (1953); Trilling, *The Meaning of a Literary Idea, Aesthetics Today*, 213 (Philipson ed. 1961); Wilson, Axel's Castle, 2 (1931).

Freedom of expression in art and literature under the First Amendment assumes that each adult in a democratic society will be permitted to find "his own proper diet." Barzun, *The Arts, The Snobs and the Democrat*, Aesthetics Today, 19 (Philipson ed. 1961). Books contain ideas which challenge and stimulate people to think, and each person must be free to read any portrayal of or insight into the human condition. "From the multitude of competing offerings the public will pick and choose". *Hannegan v. Esquire*, 327 U. S. 146, 158.

The societal interest in freedom of expression is that men will be free to develop their faculties; that men will be freed from "irrational fears". Mr. Justice Brandeis in *Whitney v. California*, 274 U. S. 357, 376. "To put the issue as simply as possible: we maintain freedom not in order to indulge error but in order to discover truth, and we know no other way of discovering truth." Commager, *Free Enterprise In Ideas*, The First Freedom, 233 (Am. Library Ass'n, Downs ed. 1960).

It has, of course, been held that "obscenity" is not protected expression, but in a series of decisions the Court has emphasized that in determining where freedom of expression ends and the State's power begins, it is the character of the indispensable rights of mind and spirit under the First Amendment, not of the limitations thereon, which determines what standard governs the choice. *Cf., Thomas v. Collins,* 323 U. S. 516, 529-530; *Speiser v. Randoll,* 357 U. S. 513, 520. See, *Butler v. Michigan,* 352 U. S. 380; *Alberts v. California,* 354 U. S. 476; *Times Film Corp. v. City of Chicago,* 355 U. S. 35, rev'g 244 F. 2d 432 (7th Cir. 1957); *Mounce v. United States,* 355 U. S. 180, rev'g 247 F. 2d 148 (9th Cir. 1957); *One, Inc. v. Olesen,* 355 U. S. 371, rev'g 241 F. 2d 772 (9th Cir. 1957); *Sunshine Book Co. v. Summerfield,* 355 U. S. 372, rev'g 249 F. 2d 114 (D. C. Cir. 1957); *Smith v. California,* 361 U. S. 147; *Marcus v. Search Warrants of Property,* 367 U. S. 717; *Manual Enterprises, Inc. v. Day,* 370 U. S. 478; *Bantam Books, Inc. v. Sullivan,* 372 U. S. 58.[4] "But our holding in Roth does not recognize *any* state power to restrict the dissemination of books which are not obscene." *Smith v. California,* 361 U. S. at 152 (emphasis supplied). Such unconstitutional restriction, if recognized, would guarantee the elimination of books of any nature unpalatable to the censor.

(b) Measured by the aforesaid constitutional standards, the book *Tropic of Cancer* by Henry Miller is,

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[4]See also, *Joseph Burstyn, Inc. v. Wilson,* 343 U. S. 495; *Gelling v. Texas,* 343 U. S. 960; *Superior Films, Inc. v. Dept. of Education of Ohio (Commercial Pictures Corp. v. Regents of N. Y.),* 346 U. S. 587; *Holmby Productions, Inc. v. Vaughn,* 350 U. S. 870; *Kingsley International Pictures Corp. v. Regents,* 360 U. S. 684.

it is submitted, entitled to the First Amendment's protections. It is a serious work of literature, expresses ideas, and occupies an important position in twentieth century literature. Kazin, *Literature*, The Great Ideas Today, 1962 (Cyc. Britannica, Inc. 1962), 146-148; Library of Congress, Guide to the Study of the United States of America, Representative Books Reflecting The Development of American Life and Thought, 131 (1960); Writers at Work, 165-191 (Cowley ed. 1963); The Creative Process (Ghiselin ed. 1952); Kunitz & Haycroft, Twentieth Century Authors, A Bibliographical Dictionary of Modern Literature, 960-961 (1942).

Tropic of Cancer was first published in France by the Obelisk Press in 1934. It was published in Prague in 1938. In 1945 and 1947, two separate editions were published in Paris by French publishers. In 1952, a German edition was published; in 1953 a Danish edition. In 1953 and 1954, an English and Japanese edition, respectively, were published in Tokyo. A Swedish edition was published in 1955. The edition here involved was published by Grove Press, Inc. in New York in 1961. An Italian edition was published in 1962, and an edition in Hebrew was published the same year in Israel. See, Perles, My Friend Henry Miller (1956); University of California at Los Angeles, Special Collections, *Henry Miller Collection*. In 1963, the book was published in England.[5] The British reviewers welcomed the "tardy publication" of the book in their country. Colin MacInnes, *Benevolent Faun*, The Spectator, 437 (April 5, 1963); Frank Kermode, *Jonah*,

[5]Prior to publication, the Attorney General stated that he was not going to institute proceedings under the Obscene Publications Act of 1959 against Messrs. Calder, the publishers. New York Times, Western ed., April 12, 1963, p. 11, col. 4.

New Statesman, 521 (April 12, 1963); Profile, Henry Miller: *Torrents of the Spirit*, The Observer Weekend Review, 24 (March 31, 1963).

A host of American and world figures have attested to the literary and social significance of *Tropic of Cancer*. The list includes, among many other eminent persons, T. S. Eliot, Norman Cousins, Aldous Huxley, Sir Herbert Read, Harry Ashmore, Eugene Burdick, John Ciardi, Wallace Fowlie, Sir Osbert Sitwell, Philip Rahv, Jaques Barzun, Count Keyserling, Ferdinand Leger, J. C. Powys and Edmund Wilson.[6]

In the United States, the Federal Government has conceded that *Tropic* is constitutionally protected by dropping efforts to prevent its importation (*United States v. Three Books, Alleged by the Customs Au-*

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[6]The Special Collections Department of the library of the University of California at Los Angeles, the sixth largest in the country, has the most complete collection of Milleriana in the world. Collected for the most part under the aegis of Lawrence Clark Powell, former head librarian, the Henry Miller Collection consists of letters, magazines, clippings, manuscripts, and related printed material in many languages of, by and about Miller. This includes almost 500 magazines and periodicals from all parts of the world: Belgium, Brazil, Canada, Cyprus, England, Egypt, France, Finland, Germany, Holland, India, Israel, Italy, Ireland, Japan, Mexico, Norway, Philippines, Poland, Russia, Scotland, Spain, Sweden, Switzerland, Tunisia and the United States.

The Collection also includes some 14,000 letters with many noted authors, artists, statesmen, critics and poets. See also, Lawrence Durrell-Henry Miller, A Private Correspondence (1963).

See also, the signatories to a Statement, *Support of the Freedom to Read*, issued after the opinion and ruling of the Hon. Samuel B. Epstein, Chief Judge of the Superior Court of Cook County on February 21, 1962, enjoining local officials from interfering with the sale of the book. *Haiman v. Morris*, No. 615, 19718. The statement and signatures appear in 6 Evergreen Review, July-August, 1962, and are also set forth in Appendix G to the Petition for a Writ of Certiorari filed in this case (Pet. App. 17, 29).

thorities to be obscene, entitled "Tropic of Cancer", "Tropic of Capricorn" and "Plexus", D.C. S.C., 1961), and by lifting the Post Office ban on the book (New York Times, June 14, 1961).

Tropic of Cancer, when published by Grove Press, Inc. in 1961, was distributed with decorous advertising devoted solely to its literary merit. Grove Press, Inc. has published approximately five hundred books. These include fiction and non-fiction—novels, volumes of poetry, plays and works on science, history, criticism, art and music. The works of older, established authors, such as Melville, Twain, and Lawrence, and the works of newer authors, such as Beckett, Behan, Ionesco and Brecht, have been issued to the American public. Among the findings of fact of the court for the Southern District of New York in *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 496 (1959) is the following: "Grove Press is a reputable publisher with a good list which includes a number of distinguished writers and serious works."

Many Grove Press books are in use in colleges and universities throughout the country, having been specifically adopted in various courses by departments and by individual instructors and teachers. Inquiry at the leading universities of the country reveals that "familiarity with the works of Miller is typically part of the general background of the teacher of modern English". Paul and Schwartz, Federal Censorship, Obscenity in the Mails, 128, n. 2 (1961). See also, Richard E. Baxter, Henry Miller: An Evaluation (1953), Master of Arts Thesis, Cornell University; Bosley D. Brotman, Dionysus. A Critical Interpretation of Henry Miller (1951), Master of Arts Thesis, Columbia University;

David W. Griffin. The Possibility of Joy: Henry Miller's Place in the American Tradition (1951), Master of Arts Thesis, Columbia University. Baxter, Henry Miller 195 (1961); University of California at Los Angeles Library, Henry Miller Collection.

When *Tropic of Cancer* was published by Grove Press, Inc. in 1961, the critics and reviewers throughout the country were substantially agreed on the importance of the work. "the first chapter in the 'single, endless, autobiography' that has been his [Miller's] life's work." Maurice Dolbier, *New York Herald Tribune*, June 24, 1961. John Ciardi, The American Poet, observed: "'Tropic of Cancer' must be defended not as an ultimate peak of greatness, but because, whether it succeeds or fails, it is written with power and compassion, and because it is charged in every passage with the author's aesthetic devotion to his form and with his humane devotion of the joy of life. To remove such a book from the experience of mature readers on the grounds that the pru nt may use it abusively is an assault upon the aesthetic experience. It is a denial of freedom on the queasy grounds that men are not fit for freedom. It is to say that the least of men shall dictate the diet of the rest." *Saturday Review*, June 30, 1962.

Ben Ray Redman wrote: "Ezra Pound, T. S. Eliot, George Orwell, and Edmund Wilson have saluted 'Cancer' as a modern classic. Horace Gregory thinks of it as 'Huck Finn in Paris'—an original and provocative conception . . . Sir Herbert Read proclaims it to be 'one of the most significant contributions to the literature of our time' . . . His [Miller's] words on art and artists, the United States, the lockstep of

conformity, Matisse, Dostoevsky, Joyce, Proust, mankind's future, and a score of other topics, keep the reader's mind alert with their challenges". Saturday Review, June 24, 1961.

Eric Moon stated: "With Joyce and Lawrence, he has been a major influence in extending the frontiers of the modern novel, and he has gone much further into enemy territory than either of the other two. . . . It is the lusty, uninhibited song of a man completely happy without illusions. It has humor, anger, art, and sex to saturation point. . . . Miller writes about sex as he writes about everything, the beautiful or the degraded, as an artist and a man who enjoys *all* that goes to make up life and living." Library Journal, June 18, 1961.

Harry T. Moore, writing for the New York Times, asserted: "It might be said of him, as Yeats said of Miller's American forerunners and true masters, Whitman and Emerson, that he lacks the vision of evil in his assertion of self-reliance, in his song of himself. . . . He has been a generally liberating influence upon other writers, for many of his values, particularly his attacks upon standardization and his reverence for life, have been widely circulated and adopted, if only unconsciously." New York Times, Book Review Section, June 18, 1961.

Terry Southern stated: "No one who has read Henry Miller's early work, or who pretends to any information about the history of creative forms, can doubt his absolute formative influence on this aspect of the contemporary scheme . . . [a] work, that is to say, hailed throughout the rest of the word as one of the very first importance, and by an author more wide-

ly read . . . than any American living, other than Upton Sinclair; or any dead, other than Mark Twain and Jack London." The Nation, November 18, 1961.

Dorothy Parker, writing in Esquire (September, 1961), declared: "The book contains, of course, all the short, ugly words that probably roused the fuss. But they are honest words, to be used with respect for their force". John K. Sherman, writing in the Minneapolis Sunday Tribune (June 25, 1961), affirmed; "The great thing about Miller is that he is no whiner but an almost Rabelaisian devourer of life, whose despair has a peculiarly American pulse, exuberance and humor." Gerald Walker, writing in the New York Post (June 18, 1961), stated: "Late or not, let's be grateful. How many great books are there, that we can afford to ignore one of them?"

(c) In the Petition for a Writ of Certiorari herein, petitioner submitted a review of the literary traditions, the nature and character of the arts, and the philosophy which permeated the first half of the twentieth century, out of which the book and its author emerged, as well as a somewhat extended analysis of the book's artistic and ideological form and content (Pet. pp. 12-22). The endeavor was to demonstrate the social importance of the work on its own terms. Petitioner does not cull the same ground again, but presents, in summary, the views there presented.

Henry Miller was in Paris in 1932 when he began writing *Tropic of Cancer*. He was an "expatriate" of the 1930's. Miller was an isolated figure, for on the one hand he was little concerned with the political or social movements of the day, and on the other

hand, by his very rejection of movements and causes, he was compelled to search for fulfillment within himself.

Europe, following the first World War, was artistically and idealogically in despair. A material world seemed bereft of spiritual values, and the worth of the individual appeared unrecognized. As the outer world lost its determinancy over man, Freud and his colleagues stressed the inner world of each individual, emphasizing that it was the content of this inner world which structured external "reality". Surrealist writers and painters, as well as the Dadaists, pointing to the nightmare reality of the subconscious and the dream, sought by their works to shock, and finally remove, the culture which they felt was stultifying the world.

On the other hand, exemplifying the conflicts inherent in the historical situation of the 1920's and 1930's, were such writers as James Joyce and Virginia Woolf. "Reality" to these writers was something more than the subconscious and the dream. An individual's personality had a totality expressed in "consciousness", a term denoting the entire area of mental attention, from subconsciousness on through the levels of the mind up to and including the highest one of rational communicable awareness. The drama of such total inner life was only a part of Reality. Hence, the development of the complex symbolic structures found in the writings of Joyce. See, Humphrey, Stream of Consciousness in the Modern Novel (Univ. of Calif. Press, 1954).

The American literary tradition, no less than the European, is reflected in *Tropic of Cancer*. Writers like Thoreau, Whitman, James, Dreiser, Lewis and

Millay were concerned with self-liberation, the search for significant experience, the quest for self-identity. Miller, with his intuitive and intellectual grasp of European thought, and by dint of his own personality, struggled, sifted, synethesized, and finally emerged, it is submitted, as a voice in the traditions.

As to *Tropic of Cancer* itself, it is not so much the narrative of a man searching for an ultimate identity; it is an account of an individual striving to escape many stereotyped identities which appear to throttle the natural self. It is a search by an individual, torn between his personal plight and his aspirations, for a way to live in society—how to find a voice, to become whole again.

The importance of Miller's search, and the way he struggled to liberate himself in order to find himself, is attested by the fact that the anxieties and dilemmas of modern man in quest for a personal reality is one of the principal social issues of the day. See, Identity and Anxiety (Stein, Vidich and White ed. 1960); Brinton, The Fate of Man (1961); Riesman, The Lonely Crowd (1961); Arendt, The Human Condition (1958); Erickson, Childhood and Society (1950); Fromm, The Sane Society (1955). Individuality can be submerged in mass society with disastrous consequences. On the other hand, it is possible, as *Tropic* suggests, to obtain a personal autonomy if one refuses to ignore or to sentimentalize the pain, the misery, the brutality, the sense of helplessness and the imminence of death that is the lot of many men in this modern age. *Tropic of Cancer* begins with loneliness and death, but it ends with an identification with humanity, and a vision of the acceptance of life through that identification. ". . . a

soil so saturated with the past that however far back the mind roams one can never detach it from its human background . . . I feel this river flowing through me—its past, its ancient soil, the changing climate" (*Tropic of Cancer*, 318).

On the frontispiece of *Tropic of Cancer* is a quotation from Emerson: ". . . if only a man knew how to choose among what he calls his experiences that which is really experience, and how to record truth truly". *Tropic* is the choice of experience by one man seeking ultimately to live without the corruptions and disease of "civilization." Miller made a "descent to the very bowels of the earth, the dark and fearsome journey in the belly of the whale", and engaged in a "bloody struggle to liberate himself, to emerge clean of the past" (*Tropic of Cancer*, 181). Miller does not ask anyone to trod the same path; indeed he furnishes no blueprints nor does he seek any disciples. In writing *Tropic of Cancer*, Miller states: "I found my own voice, liberation, in short".[7] Whether he helps other to find their "voice", is for others to decide.

(d) Almost all critics have defended Miller's use of explicit language as essential to his writing, as honest, artistically necessary, realistic and valuable. Fowlie, *Shadow of Doom: An Essay on Henry Miller*, Accent (Autumn, 1944); Krim, *The Netherworld of Henry Miller*, The Commonweal (October 24, 1952); Muller, *The World of Henry Miller*, 2 Kenyon Review (1940);

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[7]From a letter written by Miller to counsel for petitioner in answer to an inquiry by counsel as to how Miller views the controversy about *Tropic* more than two decades after its publication. The letter appears in the Petition for a Writ of Certiorari (App. J), but for the convenience of the Court it is also annexed hereto as Appendix C.

Huxley, *Death and the Baroque,* Harper's (April 1949). In view of Miller's avowed purpose to penetrate to "the hub of the wheel", he could have hardly expressed the truth of his descent without truthfully depicting the nature and character of the downward path he followed. Probably he "could have omitted" some of the "so-called four-letter words" and the episodes of sex, but "clearly it would not have been the book he planned". *Grove Press, Inc. v. Christenberry,* 276 F. 2d 433, 438-439 (2d Cir. 1960).

Miller is giving a picture of the "lost generation" of the 1930's in Paris. It is not a pretty picture, but it is not a world which Miller made. He does not give us some dry account of that historical period. He transplants us directly into that life, showing us characters and living figures.[8] They were dissolute, and he depicts their dissoluteness, as well as his own. If the language they used was coarse it was because coarse speech was utilized by the human beings who flocked together in the netherworld of Paris in the 1930's. ". . . many people in London, Berlin, Rome, New York and San Francisco are living today what Miller experienced 20 years ago". Krim, *The Netherworld of Henry Miller,* The Commonweal 70 (October 24, 1952).[9] While Miller has been influenced by D. H.

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[8]See, for an artistic representation of the "denizens of Montmartre," at the turn of the century, Toulouse-Lautrec (Harry N. Abrams, Inc. 1956), especially at 63 "Fat Maria"; 107, "The Kiss"; 116, "Rue des Moulins: The Inspection"; 120, "Friends."

[9]". . . The poet is no teacher of morals; he invents and creates characters, he brings the past back to life, and from this people may learn as though from the study of history itself and the observation of it, what happens in human life around them. If one objects to this reasoning, then he ought not to study history at all because a great many immoral things hap-

Lawrence, and like Lawrence, feels that some of the world's troubles are derived from a lack of a healthy attitude towards sex. Miller, unlike Lawrence, is not an evangalist of sex. Miller's world is multi-faceted. By presenting, however, the images of sex of the most mechanical and unloving nature, Miller shows what sex can be when it is not integrated in the total man. In so doing, he renders an important service. "Sex is almost as completely a private a matter as death, and a work of art which powerfully expresses the truth about either of them is very painful to the respectable public figure we imagine ourselves to be. Nobody can have the consolations of religion or philosophy unless he has first experienced their desolations. And nothing is more desolating than a thorough knowledge of the private self. Hence, the utility of such works as Tolstoy's *Ivan Ilyitch* and, I would venture to add, such books as Henry Miller's *Tropic of Cancer*". Aldous Huxley, *Death and the Baroque*, Harper's 84 (April, 1949).

(e) Henry Miller is a member of the National Institute of Arts and Letters, an organization incorporated by act of Congress in 1913, dedicated to the furtherance of literature and the fine arts. "Its membership is limited to 250 native or naturalized citizens qualified by notable achievements in art, literature or music." See, *Information Please Almanac* (1963) 220-221, setting forth the complete list of distinguished members.

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pens therein; he should have to go blindfold down the street, for he might otherwise be compelled to see certain indecencies; he should have to cry shame on God for having created a world which gives rise to so much dissoluteness. Furthermore, if someone should say to me that the poet ought not to show the world as it is, but as it ought to be, then I would answer him that I will not make it better than the good Lord, who must certainly have made it as it ought to be. . . ." (Letters of Gorg Buchner (July 1835, to his family).

including members of the Academy of Arts and Sciences, an affiliate of the Institute.

Tropic was Miller's first published work. Since 1934, he has written over thirty books, and a score of brochures, pamphlets and miscellaneous material. See The Henry Miller Reader, 395-397 (Durrell ed. 1959); Baxter, Henry Miller, Expatriate, 191-201 (1961). Annexed hereto as Appendix D is a selected bibliography.

Miller's critics have come to recognize that Miller's works create a new and optimistic image of twentieth century man. In an age caught up with frustrating issues of political, social and economic reform, Miller's anti-institutionalism, his cry for self-liberation, his commitment to a personal identity regardless of environment definitions, have brought increasing respect for his outlook, as well as continued criticism.

Because the social and philosophical aspects of Miller's writing were unsatisfying to the critics of the 1930's, his early admirers emphasized his characteristic American expatriate behavior. Edmund Wilson described him as "the spokesman, par excellence, for the Left Bank". Wilson, *Twilight of the Expatriate*, New Republic, 707 (March 9, 1938). By the 1940's, the political disillusion of the artists and intellectuals manifested itself in a more critical examination of Miller's philosophy. "As an artist, he must not sacrifice his individuality for the sake of some blatantly abstract and artificial ideal like the brotherhood of man. He must believe himself at all costs. That is why Miller is opposed to revolutions. In the end they involve a return to the status quo, and the artist, the uncompromising revolutionary, is against the status quo at all times". Glicksburg, Henry Miller: *Individualism in*

Extremis, The Southwest Review 290 (Summer 1948). George Orwell, on the other hand, while a great admirer of Miller, accused him of being passive and accepting, while recognizing the world's ills. "There you are, in the dark, cushioned space that exactly fits you, with yards of blubber between yourself and reality, able to keep up an attitude of the completest indifference, no matter what happens." Orwell, *Inside the Whale*, in a collection of essays of the same name 177-178 (Lond. 1940). But this womb-like existence which Orwell protested, other critics saw as a movement towards rebirth. "He [Miller] was forced to take residence in a strange world. He was forced to take that world apart in order to understand it. . . . He could only reach a state of true objectivity by becoming completely subjective, letting all experiences filter through him, whatever the outcome". Leites, *The Autochton*, Penguins 140 (1945).

Later criticism of Miller has recognized a "moral-aesthetic" creed, and passionate commitment to a vision of a universal democratic Man. ". . . in Miller's work persons and places are always transmuted by the particular moral intensity with which he contemplates them". Parkinson, *The Hilarity of Henry Miller*, The Listener, 1021 (June 19, 1958). ". . . the essential American in Miller was the potential reformer whose ruthless exposure of the sins of his native society implied a profound devotion to its ideals". Baxter, Henry Miller, Expatriate, 174 (1961). Critics have dwelt on Miller both in terms of his affirmations and in terms of his special significance for the reader. "Having found life within himself, he can point the way of life to others. By the force of his example, by the vitality

he radiates, the emotional release he effects, he serves as a leaven to stir to life the inert mass of humanity". Fraenkel, The Genesis of the Tropic of Cancer 6 (1946).

In sum, there is a growing realization among those who read Miller's works with critical perception, that his writings have an organic unity and substance, that what ultimately derives from Miller's works is a sense of devotion and dedication to self in the service of humanity, to a body of artistic and personal ideals flowing from a particular constellation of talents and compulsions, and that Miller reflects, in a very real and vital way, the history of the age.

It is submitted, therefore, in the light of all the aforesaid, that *Tropic of Cancer* by Henry Miller is a genuine work of literature which expresses ideas, and has an important position in the history and development of literature.

Petitioner, in concluding this discussion, considers it gratuitous to urge upon this Court at length the social and political consequences of censorship and suppression of writings. More than humanitarian and libertarian issues are involved whenever books are destroyed, as a long and tragic history reveals. Craig, Suppressed Books (1963). See also, Starkie, Baudelaire, 307-327 (New Directions, 1958). "Government and society have a paramount interest in independence, originality, heterodoxy, criticism, nonconformity, because all experience teaches that it is out of these that come new ideas, and because every society needs a continuous reexamination of old ideas and a continuous flow of new ideas". Commager, *Free Enterprise In Ideas* in The First Freedom, 235 (Am. Library Ass'n 1960).

Until the decision of Judge Woolsey in 1933, one of the foremost literary works of the twentieth century was deemed "obscene". *United States v. One Book Called "Ulysses"*, 5 F. Supp. 183 (S. D. N. Y.). While affirming the judgment of the District Court, Judge Augustus Hand stated in his opinion: "We may discount the laudation of Ulysses by some of its admirers and reject the view that it will permanently stand among the great works of literature. . . . It may be that Ulysses will not last as a substantial contribution to literature, . . ." 72 F. 2d 705, 706, 708 (2d Cir. 1934).

But, with all deference, the book does "stand" three decades later, and Ireland, Joyce's homeland from which he fled [See, Ellman, Joyce (1959)], today honors his memory with a Museum dedicated to the author. New York Times, June 15, 1962, page 29.[10] Aside from the anomoly that found so many persons certain that Ulysses was "obscene" just one day before Judge Woolsey's decision, and equally certain that the book was not obscene a day later, one is moved to ponder whether posthumous honors awarded to an artist maligned while he was alive does not compound the injury.

If there are those who deem Henry Miller's *Tropic of Cancer* to be "obscene" or without "social importance", the answer must be, it is submitted, to "let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where

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[10]At the dedication ceremonies in Dublin, Charles Haughey, Minister for Justice, responsible for enforcing the Irish Censorship Law, and Rev. Donal O'Sullivan, a Jesuit, director of the Irish Arts Council, were present. N.Y. Times, June 16, 1962, p. 80, col. 1.

reason is left free to combat it" (Jefferson, First Inaugural Address). The request here is not for a "seal of approval"; it is only for a ruling by the Court that the protection of the Constitution of the United States exists for the book *Tropic of Cancer*, and forbids the imposition of criminal sanctions upon those who distribute and sell the book to the public.

II.

The Statute, as Construed and Applied by the Courts Below, Deprives Petitioner of Liberty of Speech and Press Without Due Process of Law Contrary to the Free Speech and Press Provisions of the First and Fourteenth Amendments. The Judgment of Conviction Rests Upon the Use of Unconstitutional Standards for Judging the Alleged Obscenity of the Writing.

(a) As the Statement of the case herein indicates, the trial court, upheld by the court below, ruled that the state obscenity statute should be construed as removing the protection of the First Amendment from any writing which *the average person* deems utterly without social importance. The jury was instructed to this effect, and throughout the trial the witnesses were restricted to testifying whether or not in their opinion *Tropic of Cancer* had any value to the "average person" in the local community. The jury was thus left free to convict petitioner if in the jury's judgment the average person in Los Angeles would find Henry Miller's *Tropic of Cancer* to be without social importance.

One example from the record will exemplify the method used at the trial to judge the "obscenity" of the writing. The following is a colloquy between a

prosecution witness, Dr. Howard S. McDonald [R. 912] and the prosecutor:

> "Q. Sir, when you stated that you saw no socially redeemable value in Tropic of Cancer, you were referring to the average person in society, is that correct? A. That is correct. Not the—
>
> Q. Sophisticated or the worldly way? A. Either way, the people on either side. We are talking about what is described here, the average person—to the average person.
>
> Q. I see. A. That's what we are talking about here." [R. 946].

It is doubtful, it is submitted, that the standard employed by the courts below as aforestated leaves much "breathing space" for First Amendment freedoms to survive. *N.A.A.C.P. v. Button,* 371 U. S. 415, 433. Such a rule with respect to books allows the subjective prejudices of a jury the power to intrude upon the protected area. In view of the continued activities of private censorial groups in local communities, and the extreme pressures used to suppress all writings offensive to the philosophical, religious, moral or political views of such groups and local prosecutors, local juries would be under considerable compulsion, if they were not otherwise willing, to suppress a large body of literature deemed by the jury of no social importance to the "average person". Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 6-9. See also, *Bantam Books, Inc. v. Sullivan,* 372 U. S. 58; *Times Film Corporation v. City of Chicago,* 365 U. S. 43, 69-73.

But it cannot be the rule, it is submitted, that a book in the United States can be suppressed if the "average

person" in the community believes it to be without social value. "The application of such standards would reduce art and literature to levels acceptable to the masses and deprive particular primary audiences of material that is of social importance to them." Lockhart and McClure, *supra*, at 114. The man who suggested that if all mankind "minus one" were of one opinion, mankind would have no right to silence that opinion, also stated:

> "Popular opinions, on subjects not palpable to sense, are often true, but seldom or never the whole truth. They are a part of the truth; sometimes a greater, sometimes a smaller part, but exaggerated, distorted, and disjointed from the truths by which they ought to be accompanied and limited. Heretical opinions, on the other hand, are generally some of these suppressed and neglected truths, bursting the bonds which kept them down, and either seeking reconciliation with the truth contained in the common opinion, or fronting it as enemies, and setting themselves up, with similar exclusiveness, as the whole truth. . . . Such being the partial character of prevailing opinions, even when resting on a true foundation, every opinion which embodies somewhat of the portion of truth which the common opinion omits, *ought to be considered precious*, with whatever amount of error and confusion that truth may be blended."
>
> John Stuart Mill, On Liberty 31 (McCallum ed. 1946) (emphasis supplied).

This Court has stated that the basic guarantee of the First Amendment "is not confined to the expression of ideas that are conventional or shared by a majority".

Kingsley International Pictures Corporation v. Regents, 360 U. S. 684, 689. "Men are entitled to speak as they please on matters vital to them; . . . Under our system of government, counter-argument and education are the weapons available to expose these matters, not abridgment of the rights of free speech and assembly." *Wood v. Georgia*, 370 U. S. 375, 389. "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes." *West Virginia State Board of Education v. Barnette*, 319, U. S. 624, 641-642. History has amply proved the virtue of "minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society". *Sweezy v. New Hampshire*, 354 U. S. 234, 251. See also, Milton, Areopagitica 389-391, 397-399 (Great Books ed.); Madison, *Report on the Virginia Resolutions* in Elliott's Debates 569-571 (1907 ed.); Jefferson, *A Bill for Establishing Religious Freedom*, II Works of Thomas Jefferson, 438-441 (Fed. ed.); Chafee, Free Speech in the United States 33 (1941); Commager, Freedom Loyalty Dissent 14-15 (1954).

A standard which permits suppression of books because the average person deems it socially unimportant is therefore not only unconstitutional, but manifestly capricious and socially harmful. The observation of Judge Hand in the *Ulysses* opinion (72 F. 2d at 708) should be recalled: "The foolish judgments of Judge Eldon about one hundred years ago, proscribing the

works of Byron and Southey, and the finding by the jury under a charge by Lord Denman that the publication of Shelley's 'Queen Mob' was an indictable offense are a warning to all who have to determine the limits of the field within which authors may exercise themselves."

(b) The trial court, upheld by the court below, also restricted proof with respect to the essential ingredients of the offense to the standards of the "Los Angeles" community.

Professors Lockhart and McClure have expressed the view that only a national standard for judging the obscenity of a writing is compatible with First Amendment requirements, that the "standards of particular state and local communities are not constitutionally applicable". [*Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 1, 112 (1960)]. This view is predicated upon the premises, in summary, that adoption of local standards leads to the "balkanization" of freedom of expression in the country, permitting hundreds and thousands of local subdivisions to engraft their different standards upon books and art and other media of communication; that such a "crazy quilt" construction deprives an obscenity statute of any meaningful criteria of guilt; that the inevitable tendency of such vague and ambiguous law is to diminish the circulation of the press and to reduce the reading of books of general circulation dealing with sex to the level of reading of the most censorious local community; that such narrow construction results in the citizens of one part of the country enjoying the right to read literature denied capriciously to citizens of another part of the country; and that the use of "local

standards" subverts the function of appellate courts, required to apply First Amendment standards, by intruding conflicting standards imposed by a local community. 45 Minn. L. Rev., at 108-114.

If the constitutional protection afforded writings is to be determined by applying "contemporary community standards," by invoking the "common conscience of the community", then at the very least, it is submitted, the community to decide that a book is not entitled to constitutional protection should be the national community. This should be the minimal guarantee of the First Amendment protection if freedom of expression is not to be eroded.

Since *Roth-Alberts* "(. . . vital that the standards for judging obscenity safeguard the protection of freedoms of speech and press . . ." 354 U. S., at 488), this Court has constantly admonished that the standards to be applied in this area must be carefully circumscribed so as not to restrict "the public's access to forms of the printed word". *Smith v. California*, 361 U. S. 147, 154). The "evident purpose" of *Roth* was "to tighten obscenity standards" (*Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 487), and "we risk erosion of First Amendment liberties unless we train our vigilance upon the methods whereby obscenity is condemned no less than the standards whereby it is judged" (*Id.*, at 497). "Thus, the Fourteenth Amendment requires that the regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging

yet barely visible encroachments." *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 66.

Petitioner submits that the resolution of the issue here involved depends upon a "close analysis and critical judgment" (*Speiser v. Randall*, 357 U. S. 513, 520) of the method of limiting freedom of expression by local literary and psychological standards. The "angle of vision", it is submitted, should be the broad, indispensable character of freedom of speech and press under the First Amendment—not the nature of the limitation upon these fundamental liberties.

Such a scrutiny would at least reveal that the Court has uniformly held that the freedom of speech and press secured by the First Amendment is equally secured, in breadth and scope, by the Fourteenth Amendment. Thus, a writing protected by the First Amendment is protected from state suppression by the Fourteenth Amendment. Could a local jury applying "local standards" find a bookseller guilty of selling a book which this Court had held to be constitutionally protected under the First Amendment? The answer, it is submitted, must be clearly in the negative.

It is no interference with the State's power to enforce obscenity laws to hold that the trier of the facts must apply national standards. What is inherently involved in any obscenity prosecution is whether the writing is entitled to First Amendment protection. First Amendment protection means the protection which the Constitution of the "United States" provides; the protection is national in scope. Moreover, it is protection for freedom of the mind and spirit; not the sale of pots and pans to the local householder. *Cf., Smith v. California*, 361 U. S. 147, 152-153.

A local jury which authorizes the suppression of a book that the people of the country would not authorize "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control". *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642.[11] The reason why *no* State can compel a flag salute today is because the national standard of freedom of expression embodied in the First Amendment forbids it. The standard for destroying a book should be no less. See *Talley v. California*, 362 U. S. 60, 64-65.

(c) Measured by constitutional standards, *Tropic of Cancer* does not appeal to the prurient interest or go substantially beyond limits of candor in the description of sex in literature. This issue, "involving factual matters entangled in a constitutional claim" (*Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 488), is ultimately for this Court to decide.

It is submitted that *Tropic of Cancer*, considered as a whole, is not a book whose predominant appeal is to prurient interest. It is a work that expresses ideas, a work of literary merit, and a book that occupies an important place in the history of literature. The domi-

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[11]The necessary proof in obscenity prosecutions on the issue of "contemporary standards," if First Amendment requirements are to be met, is of a two-fold character: first, that the book goes beyond the standards of the local community; in addition, that the book goes beyond the standards of the country as a whole. *Cf., In re Mayall's Naturalization*, 154 F. Supp. 556, 560-561 (D.C. E.D. Pa. 1957), opinion by Chief Judge Ganey; *In re Naturalization of Spak*, 164 F. Supp. 257, 259-260 (D.C. E.D. Pa. 1958). Of course, the power of a local community to permit a broader exercise of freedom of speech and press than even the First Amendment assumedly protects, is undisputed. *Cf., State of Nebraska v. Nelson*, 168 Neb. 394, 95 N. W. 2d 678 (1959).

nant theme of the writing appeals to the literary and intellectual interest; it does not appeal to a "morbid and shameful" interest in sex.

Nor do the language and sexual descriptions found in *Tropic*, essential and integral to the writing, violate contemporary standards for literature. Many recent works of conceded merit, by reputable authors, openly sold and published, are equally frank in language and description of sexual activity. Among others are at least two books—Joyce's "Ulysses" and Lawrence's "Lady Chatterley's Lover"—which, although detailed in their descriptions of sexual activity, have been judicially declared not to be obscene. *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (S. D. N. Y. 1933), aff'd 72 F. 2d 705 (2d Cir. 1934); *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488 (S.D.N.Y. 1959), aff'd 276 F. 2d 433 (2d Cir. 1959).

See also, Lockhart and McClure, *supra*: "If freedom is to be preserved, neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression." 45 Minn. L. Rev., at 119. See also, the argument under Point I herein.

(d) Since the Court has ordered that the case of *Jacobellis v. Ohio*, argued last term (No. 164), be restored for reargument this term together with the case herein, and since both cases involve problems with respect to the use of appropriate standards to assure constitutional protection for freedom of expression, counsel for petitioner, with due deference, believe that this Court will welcome some brief discussion on the need for re-examination of the "developing constitutional standards" [Lockhart and McClure, 45 Minn. L. Rev. 5

(1960)]? as enunciated in *Roth* and in the subsequent decisions. We note that *amici*, in some instances, have urged such reconsideration, and we join in such request. "In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions." *Smith v. Allwright*, 321 U. S. 649, 665.

The basic assumptions in *Alberts* upon which the majority opinion rested were that freedom of expression under the First Amendment is not absolute; that there appeared to be a universal judgment as expressed in international agreements and the laws of Congress and the States that "obscenity" should be restrained; that obscenity is "utterly without redeeming social importance"; and that "obscene" material is therefore not within the area of constitutionally protected speech or press.

It is respectfully submitted that the aforesaid assumptions require critical re-examination. Their statement in *Alberts* perhaps served as an introduction to the real problems, but they have been unfortunately treated by the lower courts, the censors and extra-legal censors, as determinative of all First Amendment issues.

It is unnecessary, it is submitted, to canvas the merits of the "absolute" and "balancing" arguments. See *Barenblatt v. United States*, 360 U. S. 109; Frantz, *The First Amendment in the Balance*, 71 Yale L. J. 1424 (1962). It may be conceded for purposes of argument that freedom of expression is not absolute, as for example when speech is integrated with unlawful conduct. But the problem is of drawing the line between the exercise of freedom and the limitations thereon.

How shall the line be drawn? It is submitted that such question is not answered, as many courts and "citizens committees" appear to believe, by advancing the assertion that freedom is not "absolute".[12]

The other initial assumptions in *Alberts* suffer, it is submitted, from a specific difficulty—they assume common agreement on a definition of "obscenity" when as a matter of fact there is none. As Lockhart and McClure point out, there never has been an international agreement on the definition of obscenity. *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 323 (1954). A "universal judgment" that expression should be restrained without agreement in what the area of expression so to be limited, is, can hardly be deemed a weighty reason for restrictions on freedom of expression in the United States. This appears especially true when it is considered that many countries are concerned with "obscenity" only as it connotes attacks on state religions. Moreover, the history of federal and state legislation shows that these laws derive either from the comstockery of the 19th century or from laws principally concerned with blasphemy or other "impious libels". See Judge Frank's opinion in *United States v. Roth*, 237 F. 2d 796, 806-810; Kalven, *The Metaphysics of the Law of Obscenity*, Supreme Court Review 9 (1960). To place reliance upon the views of foreign countries, many without written constitutions, and upon laws in this country based on prem-

[12]"That liberty is not absolute is one of those truisms that is always brought out and put to work whenever somebody wants to censor a book or a film that he doesn't like, or to throw a teacher or a librarian or a radio performer out of his job." Commager, *Free Enterprise in Ideas*, The First Amendment 231 (Am. Library Ass'n 1960).

ises no longer acceptable under the Constitution and the First Amendment, as interpreted by this Court, appears, it is submited, unsubstantial.

The notion that an utterance deemed "utterly without social importance" is *ipso facto* deprived of constitutional protection, deserves the most critical examination because of the serious First Amendment implications involved. There does not appear to be any area of protected speech except discussion of sex which is chained with such an ambiguous concept. "To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut*, 310 U. S. 296, 310. "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too illusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Winters v. New York*, 333 U. S. 507, 510. An utterance calling for equality of treatment without regard to race may appear utterly without social importance to a southern community, but its protection under the

First Amendment cannot be doubted. *Edwards v. South Carolina*, 372 U. S. 229.

The standards for judging obscenity which the Court has enunciated do not appear to safeguard the freedoms of speech and press protected from all governmental infringement under the Constitution.[13] One ingredient, to wit, that the dominant theme of the material taken as a whole "appeals to prurient interest" has been the source of considerable confusion and the basis for unjustified invasions of freedom of expression. The difficulty lies principally in the meaning of the words "prurient interest." Very few persons, including psychologists, appear to know what these words mean. In *Alberts*, this Court noted that pruriency has been defined as "quality of being prurient; lascivious desire or thought." The American Law Institute has defined "prurient interest" as a "shameful or morbid interest in nudity, sex or excretion."

None of these definitions have proved to be workable. See, *State v. Nelson*, 168 Neb. 394, 95 N. W. 2d 678 (1959); *State v. Jackson*, 224 Ore. 337, 365-379, 356 P. 2d 495, 508-515 (dissenting opinion of Justice O'Connell). They are tautological, subjective and imprecise. They serve only to feed the prejudice of the trier of the facts and enable courts and juries to suppress writings on no other basis than the talismanic labels. If anything can be distilled from the aforesaid terms, it is that writings which cause sexual de-

[13]Our discussion here is concerned with the right of the average, normal adult to read a book dealing with sex. We believe a different category of constitutional problems are presented when a narrowly drawn statute specifically limited to the distribution of writings to children is involved.

sires or sexual thoughts may be suppressed. If this be the intendment of the "prurient interest" standard, then at least two difficulties are presented: the first, that in no other area of speech and press has it ever been accepted by this Court that utterances may be interdicted because they arouse thoughts and desires; second, if books are to be suppressed because they may arouse a sexual desire or a sexual thought, it is much to be feared that a great many libraries will be deprived of most of their contents, including the recent library assembled for the White House by a distinguished group of scholars.

Mr. Justice Harlan, in *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, suggested that the unseemliness of utterances could not be deemed obscene unless, in addition, the utterances were shown to have a "likely corruptive effect." (*Id.* at 484-487). While such view may appear at first glance to tighten the definition, it must be stated with deference that the "corruptive effect" concept is also far from a satisfactory solution of the constitutional problem. Aside from the complex question involved in determining whether an average normal adult with his or her particular background can ever be "corrupted" solely by the reading of a book to the point of becoming changed in character and outlook, there remains the problem of whether or not writings can be suppressed under the First Amendment solely because some judge or jury may believe that a reading of the work will cause the average normal adult to begin to change from Dr. Jekyll to Mr. Hyde.

With respect to the ingredient, "contemporary community standards," and "the common conscience of the

community," we find here again the difficulty of determining what national standards are or what is meant by "common conscience of the community," and also the constitutional objection that the writing of a dissenting voice should not be suppressed because the community does not like it. Mr. Justice Jackson stated in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 638: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." Mr. Justice Jackson also stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (*Id.*, at 642).

It also appears plain today that the standards for the protection of freedom of expression under the First and Fourteenth Amendments will not be safeguarded by resort to the "hard core pornography" test. While this phrase may have evoked a particular image of restricted material in the mind of the Solicitor General, who briefed the argument in *Alberts*, it appears clear that the same image does not exist in the minds of many lower courts, and in those censorial groups who now patrol all outlets engaged in the circulation of the press. As the majority opinion in the recent decision by the New York Court of Appeals in *People v. Fritch*, ... N. Y. 2d ....., 6 N. E. 2d ....., reveals,

the words "hard core pornography" are nothing more than words, and the "hard core pornography" test is nothing more than a vehicle for suppressing freedom of expression.

This Court can observe, it is submitted, from a reading of Judge Scileppi's opinion in *Fritch* that the standards for judging obscenity enunciated in *Alberts* have become nothing more than labels, and this Court's repudiation of the *Hicklin* doctrine is grievously ignored in that opinion. It is not uncommon today for private censorial groups in the community in similar manner to send through the mails excerpts torn out of context from a book urging recipients to fight "smut" on the basis of such excerpts.[14]

It is respectfully submitted that no "compelling interest" has been advanced to justify the treatment of writings dealing with sex as *sui generis* and outside the pale of constitutional protection. Insofar as such writings oppose the moral or ethical standards of the day, they would appear to have the same right to protection as any other writing which attacks accepted conventions. Insofar as such writings create sexual thoughts or sexual desires, they deserve protection

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[14]For example, the "California Citizens for Decent Literature" has sent through the mails a letter directed generally to the public asking for financial contributions to fight "pornography" and enclosing in a sealed envelope an excerpt from *Tropic* the same as the excerpt contained in Judge Scileppi's New York Court of Appeals opinion. See, Los Angeles Times, August 2, 1963, article by Paul Coates.

The Brooklyn New York Tablet of July 18, 1963 reports that a similar group, "Operation Yorkville," made a major contribution to the outcome of the case in New York. It is stated: "For nine months, Operation Yorkville and other area 'Operations' begun by the group, have sent the Court of Appeals thousands of letters and cards expressing community standards."

nevertheless just as much as writings which arouse political, economic, social or other related desires and thoughts. There does not appear to be any reason why books and other media of communication dealing with sex should not have the same rights and the same limitations as are accorded all other expressions under the Constitution of the United States and the decisions of this Court. There are ample laws available and ample power available for the States to deal with sexual misconduct without invading the area of protected expression. To enforce the provisions of the Constitution is not to weaken the power of the federal government or the power of the States. "It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 637.

Conclusion.

For the reasons stated, the judgment of the Court below should be reversed.

Respectfully submitted,

STANLEY FLEISHMAN,
Counsel for Petitioner.

Of Counsel:
SAM ROSENWEIN

APPENDIX A.

Memorandum Opinion and Judgment.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Bradley Reed Smith, Defendant and Appellant. Superior Court No. CR A 5113, Trial Court No. 151588.

Appeal by defendant from judgment and order granting probation, of the Municipal Court of the Los Angeles Judicial District, Kenneth L. Holaday, Judge. Appeal from judgment dismissed; order granting probation affirmed.

For Appellant — Brock and Fleishman by Stanley Fleishman.

Amicus Curiae in Support of Appellant — A. L. Wirin, Fred Okrand and Nathan L. Schoichet.

For Respondent — Roger Arnebergh, City Attorney, Philip E. Grey, Assistant City Attorney, Edward P. George, Deputy City Attorney.

Appellant was found guilty by a jury in the Municipal Court of the Los Angeles Judicial District of violation of P. C. § 311.2, by reason of his exhibiting and distributing of obscene matter, the book, "Tropic of Cancer," and probation was granted by that court.

Appellant argues here that the book "cannot constitutionally be held obscene" under the code "in the light of the guarantees" of the United States and California Constitutions, and that the jury verdict never answers the question of constitutionality or whether the book was "utterly without redeeming social importance" with-

in the definition of P. C. §311(a). Of course, the jury makes no specific finding of constitutionality, but the trial court had instructed the jury in the language of the code and the meaning of obscenity as determined by the California and United States Supreme Courts, in which we find no error. It is presumed, in the absence of any showing to the contrary, that the jury followed the law as to which it was instructed. Thus the jury impliedly found that the book was "utterly without redeeming social importance"; a finding amply supported by respondent's expert witnesses. With this finding we must agree, since, as we stated in *People v. Harris* (1961), 192 Cal. App. 2d Supp. 887, 894; "We hold that, if the contents of the book could not support an implied finding that it is obscene, the question is for the court, but if it could support such a finding, the question is for the jury as in any other case where there is an issue of fact." In *Roth v. United States* (1957) 354 U. S. 476, 490, 1 L. ed. 2d 1498, 1510, as we pointed out in *People v. Harris, supra,* p. 894, the Supreme Court approved an instruction informing the jurors that they were "the exclusive judges of what the common conscience of the community is. . . ."

The recent case, *People v. Williamson* (1962), 207 A. C. A. 885, 888, held that ". . . whether a particular book is obscene is primarily one of fact," relying on *Roth-Alberts* which approved the definition of obscenity stated in *People v. Wepplo* (1947), 78 Cal. App. 2d Supp. 959, 961. The Supreme Court of California in *In re Harris* (1961), 56 Cal. 2d 879, 880, stated: "The standard for judging obscenity adequate to withstand the charge of constitutional infirmity is whether *to the average person* [emphasis ours], apply-

ing contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. [Citations.]" *People v. Williamson, supra,* quotes that standard verbatim, then upholds the giving of an instruction employing the almost exact wording of the definition of obscenity contained in P. C. § 311 (a). We believe that juries are composed of average persons.

Appellant argues that the Legislature made as an integral part of the definition of obscenity, that the matter be utterly without redeeming social importance (appellant at p. 12 opening brief uses the word "value," which is not the same as the word "importance" employed by the Legislature), and thus has made it the obligation of every judge and appellate court before whom the constitutional issue is raised, to make an independent review of the matter to determine whether the matter can be found "constitutionally" to be obscene. He cites numerous United States Supreme Court decisions to "the requirement of independent judgment." A review of those cited shows: *Times Film Corp. v. City of Chicago* (1957) 355 U. S. 35, 2 L. ed. 2d 72; *Sunshine Book Co. v. Summerfield* (1958) 355 U. S. 372, 2 L. ed. 2d 352; *One, Inc. v. Oleson* (1958), 355 U. S. 371, 2 L. ed. 2d 352 (all per curiam opinions merely citing the *Roth* case); *Kingsley Corp. v. Regents of Univ. of N. Y.* (1959) 360 U. S. 684, 3 L. ed. 2d 1512, (concurring opinion of Justice Harlan, concurred in by Justices Frankfurter and Whittaker at 3 L. ed. 2d 1524, wherein those Justices were referring, at p. 1526, not to a trial court's finding but to three of seven New York State Justices' opinion, 151 N. E. 2d at 200, and to the scope of the applicable

New York law, and stated: "The opinion . . ., as . . . with §§ 122 and 122-a themselves when independently read in their entirety, . . ." and at p. 1527 of 3 L. ed. 2d, Justice Harlan said: ". . . I have viewed this film"): *Manual Enterprises, Inc. v. Day* ..... U. S. ....., 8 L. ed. 2d 639, in which the justices could not agree on an opinion, concerning a ruling by the Postmaster's Department, barring certain magazines from the U.S. mails, under a Federal statute; Justices Harlan and Stewart made an independent review of the proscribed magazines (id. p. 648); it does not clearly appear that the other Justices did so. Those cases do not support the thesis that independent judicial judgment on review is *required*, although, of course, it may be practiced. The other cases cited by appellant from federal courts inferior to the Supreme Court or from the courts of other states are at most merely persuasive and not binding on our court.

Moreover, the book here in question has been read by this court, unlike the U. S. Supreme Court, except for Justice Harlan, in the *Roth* case (1957) 354 U. S. 476, 1 L. ed. 2d 1498, 1509, 1514. From the reading, we regard the book, as a whole, as an autobiographical abortive attempt at literature by an American self-expatriate in Paris, separated from his wife who sends him money at times, from whom he is mentally, spiritually and physically divorced, indulging in adulterous relationships with Paris street women and others, whom he frankly and appropriately terms "whores",

as well as other barrack-room four-letter words; his chief obsession, interest and necessity (waking or sleeping, drunk or sober) is food, drink and sexual acts or conversation about the same; the slimy flow of his attraction to excrement expressed in a four-letter word and thoughts thereof runs like a sewer through his printed work; the putrid paragraphs and pages of pornography pervade the book. Though some pages present the author's thoughts and ideas, at times cleverly written, describing his selfincrimination as a moral derelict and social dissenter, belonging "not to men and governments"; but even these pages are often intersticed with the putrescence and slime of his mental sewer, his lewdness and lascivity with which he is constantly preoccupied. The entire book is obscene, to the average person, applying contemporary standards, and is predominantly an appeal "to prurient interest, *i.e.*, a shameful or morbid interest in nudity sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance", as defined in P. C. § 311 (a). Eighteen expert witnesses of stature thought so and so testified; the jury thought and found so; so do we. We hold, as did the jury, that the book is obscene and utterly without redeeming social importance. Although *Roth v. United States* (*Alberts v. California*), 354 U.S. 476, 1 L. ed. 2d 1498, states that "ideas having even the slightest redeeming social importance . . .

have the full protection of the guaranties . . .", we must consider the language of the court, immediately following the above: "unless excludable because they encroach upon the limited area of more important interests." (p. 484 U. S., 1507 L. ed. 2d) We hold, not only, that the book has not the slightest tendency to show some social importance, but also that it lacks anything in the slightest *redeeming*. In our opinion the protective interest of the state in the morality of its citizens, would be encroached upon should we hold otherwise. Further, were we to substitute our independent judgment in favor of the free speech and press guarantee, which we do not, it would be to fly in the face of the California Constitution, Art. 1, section 7, reading: "The right of trial by jury shall be *secured to all*, and remain inviolate. . . ." (Emphasis ours.)

"Under the constitution of this state the same right is guaranteed to the people as to the defendant to have a jury ultimately pass upon *the fact* of guilt or innocence." (Emphasis ours.) *People v. Stoll* (1904) 143 Cal. 689, 696. "In a criminal action the sovereign has the same right to have the truth of its accusation against the defendant determined by a *trial court* to the same extent and in the same degree as has the accused. (*People v. Stoll*, 143 Cal. 689, 696. . . ." (Emphasis ours.) *People v. Wisecarver* (1944) 67 Cal. App. 2d 203, 209, quoted in *People v. Misner* (1955) 134 Cal. App. 2d 377, 380-1. See also 29 Cal. Jur. 2d pp. 475-482; 497-500.

We are of the opinion that where substantial evidence supports the implied findings of the jury, an appellate court, not only is not required to but should not in effect set aside the factual determination by a jury that the book was obscene and that the appellant violated our penal provisions making obscenity a misdemeanor. To do so would encroach upon and destroy the People's right of trial by jury, secured to them by our Constitution, which thereby should "remain inviolate". That right would nullify the finding by the jury that the book in fact was obscene, viewed by them as to every explicit facet of the code definition, contained in one complete sentence.

We believe that the jury's finding of obscenity should be accorded at least as great, if not more constitutional weight, than that of a writer's right to imprint or disseminate through a bookstore, his depraved and degrading filthy words and obscene utterances and lewd depictions of salacious episodes of sexual scenes and mental images or than that of a bookstore proprietor to exhibit and distribute such demoralizing obscene writings. This issue is not the right of any person to read such writings, but the right of appellant to sell, exhibit or distribute them when they have been found obscene, in violation of a constitutional state statute, by a jury whose finding is supported by very substantial evidence, under instructions informing them of the legal standard of obscenity as interpreted by the highest court of our land.

The appeal from the judgment is dismissed, there being no judgment. The order granting probation is affirmed.

Dated Oct. 24, 1962.

HULS,
Judge.

I concur:

SWAIN
Presiding Judge

I concur. The purpose of this memorandum is not to limit or qualify the main opinion but to present an additional basis for affirmance. In my opinion the judgment may be affirmed even though our own examination of the book may disclose that substantial portions of the book have much social importance. Solely to illustrate the distinction I wish to make, let us consider the example of an author who writes something which even the most hardened purveyor of pornography would concede was obscene and who publishes it within the covers of a book which also contains some well-recognized literary classic, admittedly not obscene and having great social importance. Because they are two separate unconnected writings, we are sure all would concede that the latter could not redeem the former and the "book" could be banned. I believe there is only a difference in degree between that and a situation where there is added to a legitimate literary work certain obscene passages, not for the purpose of enhancing the literary passages but for the purpose of

appealing to the nonliterary audience interested only in such smut, in order to sell books to them. Of course in determining whether the criticized portions are indeed obscene, they must be considered with and as part of the entire novel, and if so considered as a whole the matter is not obscene then there is no violation of law. But if so considered they are not a legitimate part of the literary work but are added islands of smut (to use a different but more accurate four letter word than perhaps the author might have used), then such obscenities are without anything to "redeem" them and, within the meaning of the statute and cases, are "utterly without redeeming social importance." I am not saying that all such material here is unnecessary to the development of the ideas the author is trying to convey. Some portions of it may be entirely proper. I am saying that the jury was justified in finding as a matter of fact that the author went too far, and we would not be justified in holding as a matter of law that the book is not obscene.

SMITH
Judge

APPENDIX B.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. California Penal Code, §311 provides:

> "As used in this chapter:
>
> "(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.
>
> "(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechan-

ical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

4. California Penal Code, §311.2 provides:

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

APPENDIX C.

Letter of Henry Miller.

Big Sur, California
Dec. 26th, 1962

Stanley Fleishman, Esq.,
1680 Vine Street—Suite 700,
Hollywood (28) California,

Dear Stanley:

At your suggestion I am setting down some of my views concerning the *Tropic of Cancer* case, which I understand is on its way to the highest court of the land.

Tropic of Cancer was begun in Paris, not Brooklyn, when I was in my fortieth year. I had already been married twice and was the father of a child. I had begun writing almost ten years before, with no success whatsoever. I left New York, my birthplace, in the early part of 1930, determined to begin life anew. In 1928, due to a freak of fortune, my wife and I traveled about in Europe several months. The impressions received during this trip abroad convinced me that if I were to continue my career as writer Europe was a better place for me to do it than America. Somehow I did not fit into the American scheme of things. From the time I graduated from High School until I decided to become a writer I must have had a hundred different jobs. I quit the last one—employment manager of the messenger department of the Western Union Telegraph Co.—resolved never to look for a job again but to live or die as a writer. That was in September 1924. *Tropic of Cancer* was published in Paris in September 1934. During this ten year period I had

written three books and any number of short stories and articles. To the best of my knowledge only two or three of the latter—none of the books—were ever published. You can imagine that it was in something like a state of desperation that I resolved to try my luck abroad.

I had imagined on leaving America that I was going to Spain, but I never got farther than Paris. I arrived there in the Spring of 1930, knowing nothing of the French language. While writing the *Tropic of Cancer* I was obliged to live by my wits, as the book sets forth. The difficulties I had experienced in pursuing the career of writer prior to leaving America were considerably augmented, to put it mildly, on arriving in France. Looking back on it all I must confess, however, that it was more enriching and instructive starving in Paris than in my home town. Thanks to the aid and encouragement of the friends I made—largely expatriates like myself—I managed to survive and finish the book. It was something of a miracle that I found there in Paris the one publisher in all the world courageous enough to sponsor such a book: Jack Kahane of the Obelisk Press. Between the time he accepted the book and its publication I rewrote the book three times.

I have often referred to this work as an ice-breaker. In writing it I found my own voice, liberation, in short. This was due, undoubtedly, to the life I led, by which I mean not only the struggles and hardships of keeping alive in a foreign land but also as a result of a growing acquaintance with French literature, the French way of life, and the acceptance accorded me by French writers. Unwittingly I found myself living

that "bohemian" life which so many celebrated writers and artists before me had been obliged to live for one reason or another. My book might be regarded, I suppose, as a celebration of that splendidly miserable kind of life. In writing it, I ought to add, I had almost no hope of its ever being accepted by a publisher. It was something I had to do in order to preserve my own integrity. It was a case of do or die. Certainly the last thing I ever dreamed of was that it would one day be published in my own country.

Perhaps it is not a "pleasant" book. It has proved, however, to be an "instructive" one—for those who know how to read it. Of that I have had much interesting testimony during the years following its publication. In the files of the library at U.C.L.A. are thousands of letters from readers of the book all over the world. The burden of most of these testimonials is that the book had a liberating effect, that it inspired hope and courage, the courage to live one's own life, come what may. It had this effect, I presume, because it is a naked, vivid account of one man's struggles with almost insuperable odds, because it is a revelatory account of this man's life, sparing nothing. Many of these readers confessed that it was the first time in all their reading experience that the whole man had been portrayed. They saluted the author as one who had restored a new kind of integrity to literature, to *our* literature, at least.

The truth of these assertions I myself discovered later when I began to investigate the emasculative process which Anglo-Saxon literature has undergone these last few hundred years. With the tremendous upheavals which the second world war brought about it became

more than ever obvious to me, and others, that our literature was not rendering a true picture of the known behavior, sexual behavior particularly, of the citizens of the Western world. Some measure of freedom had been gained perhaps, though this is not always clear, but certainly not freedom of expression in literature

Perhaps my book would have died a normal death had it not been discovered and touted by the American and British troops stationed abroad during and after the war. I am thinking here not only of the forces in Europe, but in Asia and Africa also. (In China alone, I have been told, over 100,000 copies—pirated editions— were sold.) With the end of the war the book went into a number of translations, including French, German, Czech, Swedish, Danish, Spanish, Portuguese, Japanese, Dutch, Finnish, Hebrew, Italian. In the countries where the book has been permitted to be sold and distributed openly it has been read and accepted by the public at large, not simply by cliques and cultists as was the case in America during the years it was banned here. I have never heard, incidentally, that the reading of the book brought about a general demoralization or an increase in crimes of a sexual nature. In all these countries, moreover, the foremost critics of the land usually hailed the work as an important contribution to literature. In my own country, because of this book and others of like nature which followed, I was elected to membership in the National Academy of Arts & Letters. This before the ban on these books had been abolished.

Certainly this book has provoked attention and discussion wherever it has been published. In every country there are those who believe that the author went

too far, that certain things may be said but not written and so on. The intensity of these discussions varies with the habits and traditions of the citizens of the various countries. Back in 1953, when I was asked to appear before the Juge d'Instruction in Paris in connection with the book *Sexus,* the judge finally asked me if I believed in complete freedom of expression. And I answered Yes. I cannot imagine a writer sitting down and saying to himself: "I think I will permit myself to say this but not that." I know, of course, that there are plenty of writers who endeavor to cater to the public's taste and who, in so doing, have an eye on the market. These men I do not regard as writers. A serious, dedicated writer is in my opinion, a man who stands behind every word he puts down and who does not impose restrictions on himself for fear of incurring public disfavor. He writes because he has the urge, because he can do no other. True, in every period there are only a few such individuals, but it is my belief that it is only these few who contribute anything of value to literature, who nourish the love of letters.

In my youth my idols, among American authors, were such as Thoreau, Emerson, Walt Whitman; they still are, I should add. I regard them as revolutionary spirits, men who were against the trend of the times. Perhaps I was drawn to such writers because I am myself a born rebel. To-day, my birthday, I am seventy one years old—and still a rebel. A rebel who has learned, as St. Francis of Assisi put it, "not to try to change the world, but to change worlds."

To come back to the free spirits . . . If they had been obliged to write down to the level of the "normal

community standard", as the phrase runs, would we have to-day the words which made them famous? Why should any thinker, in any field, be required to make his thoughts palatable and acceptable to the ordinary citizen? As a member of a great community which boasts of the exceptional freedom its citizens are permitted to enjoy, it seems to me that this question is not out of place. Years ago, when reading a work of Wassermann's called *The Maurizius Case*, I copied out a long passage from the mouth of one of his characters. It began something like this . . . "When I utter the word Europe I think of . . ." and here he proceeds to name the illustrious guiding spirits which laid the foundation of our civilization: poets, novelists, artists, thinkers, scientists, philosophers, religious leaders and so on. An exciting list, truly, since it embraced all those who made the Europe which has influenced us and the world. Reading this roster one cannot but be impressed with the number of leading spirits who, in giving of their best, were maligned, slandered, persecuted, imprisoned, tortured, executed, burned at the stake, anathematized. It would almost seem as if those who fought and died to insure our freedom, especially freedom of thought, were looked upon not only as enemies of society but as monsters.

The question in my mind is not how far one should be permitted to go in expressing oneself freely but how great is the gap, and how dangerous for the future of mankind, between the daring inspired by conviction and integrity and the conformity based upon inertia, stupidity, cowardice and hypocrisy? Are we here on earth to live like sheep, live in the herd, or to follow our own bent, our own conscience? Should we be fear-

ful of revolutionary thinking or welcome it? Should we act as our fathers and forefathers or as free and individually unique beings? And finally, is freedom itself to be interpreted and circumscribed by the few, the many, or by each man for himself?

Much has been said, during the course of the many trials which this book has provoked, of the danger to society, particularly to the young, which free circulation of the book involves. No one, to my knowledge, has yet pointed out a single instance where such has been the effect. And the book has had so far well over a million readers. We do know, on the other hand, the disastrous effects upon adults as well as young people of drugs, tobacco, alcoholic beverages, weapons, even automobiles. Is it possible that we can adapt to certain hazards and not others? Are certain words and expressions, even though commonly used, not to be employed in writing? Do they really constitute such a dangerous menace? Or is it not simply a matter of overcoming one more built in prejudice? We all know that when it comes to the classics a liberal use of what is called obscenity may be found. On what presumption is the freedom to read the classics permitted? Is time the test? If so, what hope is there of obtaining new classics?

I use the word classics deliberately. I regard *Tropic of Cancer* as such, a classic. Despite all that has been said against it, despite all the efforts to suppress it, it continues to make its way, to find more and more readers. It is now almost thirty years since its first publication, in Paris. It is still in its infancy, one might say. Previous suppression of its sale, in this country, did not prevent its being read. In my travels

about the country I have found copies which were smuggled in ten and twenty years ago in the homes of the most eminent and respectable people, including judges and ministers of the gospel. Moreover, should its sale in this country now be forbidden, those who still wish to have copies have only to write to publishers and booksellers abroad. Moreover, restriction of sale or of distribution does not of itself kill a book; on the contrary, evidence shows that such procedure only whets people's appetite. This being so, I fail to grasp the logic which animates those who wish to impede its sale.

As to its sale . . . I have been accused at times of having written it expressly to make money, that is to say, of having purposely used objectionable language in order to make appeal to certain readers and thus further its sale. Nothing, of course, could be further from the truth. I have never written anything expressly to make money. I have been relatively poor, for many years desperately poor, until the last few years. When the book was published in Paris my publisher neglected to obtain an American copyright, because it never occurred to him that it might one day be published in this country. One could hardly say that "we" conspired to bring out a book which twenty or thirty years later would become a best seller in the United States. (At the moment of writing this I am informed that a reputable English publisher will now attempt to bring the book out in England, which is the last barrier in the free world.)

I trust that it is apparent from the foregoing that I am not attempting to present myself as the author of a nice, clean, wholesome piece of work. I think of

this work as a sincere, honest effort which, in liberating me as a person and a writer, has somehow done the same for many others. I make no attempt to evaluate it as literature, since that is the task of posterity. But I feel certain that it is a work which will live no matter what is said or done about it. And even if I am "in the tradition", as most Europeans agree, I do not regard myself as a "monster" but as a sane and useful member of society. I have found life worth living, even when unbearably difficult, and I think this view of life permeates not only the book in question but all my work.

Sincerely,

/s/ HENRY MILLER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. [redacted] 72

BRADLEY REED SMITH,
Defendant-Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff-Appellee.

ON CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES.

BRIEF OF AMERICAN LIBRARY ASSOCIATION AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 812

BRADLEY REED SMITH,

Defendant-Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Appellee.

ON CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES.

BRIEF OF AMERICAN LIBRARY ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE.

The American Library Association is the oldest and largest national library association in the world, with thirteen divisions, fifty-four state, regional and territorial chapters, and eight affiliated organizations. Founded in 1876, the Association has a membership today of more than 25,000 librarians, libraries, library trustees and friends of libraries.

In furtherance of its objective to extend and improve

library service and librarianship in the United States and throughout the world, the Association seeks to make books and ideas vital forces in American life, and to make libraries easily accessible to all people.

It has long been the position of the American Library Association to defend the right of the individual to read any book. The freedom to read is basic to our American way of life; censorship in any form infringes on this freedom. *Amicus* believes that the issues involved in this cause of action vitally affect and threaten this basic freedom. The matter is of particular concern to the Association and to its membership, since under the California statute involved, the Association and its membership could be held guilty of the crime with which the defendant is charged.

This brief is submitted with the consent of the parties.

SUMMARY OF ARGUMENT.

The defendant-appellant herein was found guilty by a jury in the Municipal Court of the Los Angeles District of violation of California Penal Code, § 311.2 by reason of his exhibiting and distributing the book, *Tropic of Cancer*, allegedly obscene. The statutory definition of obscenity, contained in Section 311, complies with the majority opinion in *Roth* v. *United States*, 354 U. S. 476 (1957).

It is our position in the first portion of this brief that the decision in *Roth* is neither sound in theory nor is the resultant California statute constitutional in practice. The reference to other categories of utterances rightly excluded from the protections of free speech and press, such as libel, is a false analogy and provides no authority for the decision in *Roth*. Moreover, we submit, a categorical definition for obscenity cannot constitutionally be made the basis of a statute prescribing criminal penalties for the sale or distribution of literature.

We further urge in the second portion of this brief that no jury, judge or court should be provided, as they are under the California statute and the doctrine announced in *Roth*, the legislative authority to condemn a book and imprison its author, publisher, seller and exhibitor. The evil toward which the California statute involved is directed can best be vanquished, without the attending injury and limitation to freedoms of speech and press, by reliance upon the choice of individuals to read or not to read, and upon the advocacy or criticism of professionals, groups and associations expressing interest and concern with literature. The power to persuade, in this context, is more compatible with our Constitution than is the power to imprison, and in the final analysis far more effective.

ARGUMENT.

I.

THERE IS NO CONSTITUTIONAL BASIS FOR EXCLUDING FROM THE PROTECTIONS OF FREE SPEECH AND PRESS CATEGORICALLY DEFINED OBSCENITY, AND THE DEFINITION ADOPTED BY THE CALIFORNIA STATUTE IS UNCONSTITUTIONAL IN PRACTICE.

The dispositive decision of this Court on the issues presented herein is to be found in *Roth* v. *United States*, 354 U. S. 476 (1957). The question there posed was whether "obscenity is utterance within the area of protected speech and press". From recognition that "this Court has always assumed that obscenity is not protected by the freedoms of speech and press," *id.* at 481, the majority reviewed the circumstances surrounding the phrasing of the First Amendment, made analogous reference to the then current limitations on libel, blasphemy and profanity, and concluded that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . We hold that obscenity is not within the area of constitutionally protected speech or press." *Id.* at 484-85.

The majority in *Roth* seem to base their conclusion on three postulates:

1. Obscenity is outside the protection of the First and Fourteenth Amendments because it always has been.

> "At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press." *Id.* at 483.

2. Obscenity is utterly without redeeming social importance and is thus not within the protection of the First Amendment.

> "Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained. . . ." *Id.* at 484-85.

3. Obscenity, like other classes of utterances such as libel, may be excluded from the protections of the First Amendment because it encroaches upon a limited area of more important interests.

> "All ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests." *Id.* at 484.

The California statute involved here artfully mirrors the standard for judging obscenity approved by this Court in Roth.[1] Its application to the defendant and to the *Tropic of Cancer* provides an excellent opportunity to examine the theory upon which this Court's pronouncement was based, and a typical example of its practice—in this case by the California legislature, by a California jury and by the California courts. *Amicus* respectfully urges that the theory upon which the *Roth* decision is based is not sound, and the facts presented by the instant cause of action dem-

1. California Penal Code, § 311 includes both the specific standard adopted in Roth, viz., "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest," 354 U. S. at 489, and the Court's statement that "all ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties . . ." *Id.* at 484. The California Supreme Court in *Zeitlin* v. *Arnebergh*, 32 U. S. L. Week 2044 (July 23, 1963), has concluded that the California statute thus prohibits only hard-core pornography.

onstrate that the standard adopted is not constitutionally adequate.

A. The Three Postulates of Roth Do Not Support Its Conclusion.

1. *Obscenity is outside the protection of the First and Fourteenth Amendments because it always has been.*

As Justices Harlan and Douglas pointed out, 354 U. S. at 507, 509, this completely begs the question. The question remains: "What is obscenity?"

Some meaning might be found in the statement in *Roth* that "at the time of the adoption of the First Amendment . . . obscenity . . . was outside the protection intended for speech and press," if obscenity were, contrary to the statement in *Chaplinsky*,[2] a "well-defined and narrowly limited class of speech." Such, however, is not the case.

The difficulty with "obscenity" as a categorical—as with other concepts of totally subjective evaluation, such as "good", "bad", "beautiful" and the like—is that its meaning depends upon a host of historical, sociological and psychological factors interwoven under particular circumstances, in a particular place at a particular time.[3] Divorced from these factors, and from time, place and circumstance, it is an empty label which this Court, it is respectfully submitted, has for too long attempted to fill with some recognizable and constitutional content.

One might well determine which writings, speech or other

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2. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-72 (1942).

3. "We are—all of us—still in the blissfully ignorant position of the delegates to the old Geneva Conference on the Suppression of the Circulation and Traffic in Obscene Publications, who discovered that they could not define obscenity, and then 'having triumphantly asserted that they did not know what they were talking about . . . settled down to their discussion.'" 'To Deprave and Corrupt . . .' 53 (Chandos ed. 1962).

communications were considered "obscene" at the time of the adoption of the First Amendment and thus outside its protection.[4] It could then be argued that they are, therefore, still properly excluded. However, there would seem little purpose in such effort, since this Court would not condone adoption of a standard existing 175 years ago, recognizing as it does that the Constitution is a living instrument.[5]

It must be shown, we submit, that the content of the word "obscene" as established by the Court in *Roth* is either subsumed within the definition of "obscene" as it existed at the time the First Amendment was adopted, or is sufficiently similar in purpose or principle. If such a showing is not made, no historical precedent to the *Roth* decision emerges from a finding that a category of utterances labeled obscene were excluded at the time of the adoption of the First Amendment. There is no magic in nor constitutional obstacle overcome by mere use of the word "obscene". Reference to a label to show precedent or authority, rather than to its meaning or content, is a dangerous course to set, for history records that the good name emblazoned upon a banner often hides the evil motivation of those who march beneath.[6]

It seems highly unlikely that today's definition of "ob-

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4. See, e. g., Judge Frank's scholarly analysis in the Appendix to his concurring opinion in *United States* v. *Roth*, 237 F. 2d 796, 806-09 (2nd Cir. 1956).

5. See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 17 (1921): "The great generalities of the constitution have a content and a significance that vary from age to age."

6. "A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the road into existence." *Snyder* v. *Massachusetts*, 291 U. S. 97, 114 (1934).

scene" is subsumed within that existing at the turn of the 18th Century, for certainly the catalogue of early writings compiled by Judge Frank concurring in the Court of Appeals decision in *Roth*[7] includes books whose dominant theme could be held to appeal to "prurient interests." Wherein lies the social importance of Benjamin Franklin's *Letter of Advice to Young Men on the Proper Choosing of a Mistress* or the *Speech of Polly Baker*?

If not subsumed within the concept of obscenity prevalent in the minds of the founding fathers, is today's definition of obscenity sufficiently similar in purpose or principle to that concept to permit reference to it as precedent?

It may well be that the purpose or principle underlying both the 18th Century objection to obscenity and that in *Roth* is the desire to preserve "social order and morality." If so, *amicus* submits that a showing should be demanded, not merely with the respect to *Tropic of Cancer*, but with respect to every application of a statutory categorical—be it "appeal to prurient interest" or satisfaction of voyeuristic or vicarious appetite—that social order and morality are advanced by such a limitation of the First Amendment. Absent such a showing, neither the condemnation of *Tropic of Cancer* nor the applied statute should be permitted to stand.

Justice Harlan partially concurring in *Roth* points out that the state legislature may make "a judgment that printed words can 'deprave or corrupt' the reader—that words can incite to anti-social or immoral action."[8] If this be true, some proof should be demanded that the words do have such effect. Absent such proof, reference to the preservation of the social interest in order and morality is without value. As both Justices Harlan and Douglas

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7. 237 F. 2d at 806-809.
8. 354 U. S. at 501.

pointed out, 354 U. S. at 500, 509, 512-3, governmental regulation must concern itself with anti-social acts, not thoughts.

Amicus respectfully submits that the postulate that obscenity has always been outside the First and Fourteenth Amendments does not support the conclusion in *Roth* and is of no real value in the decision of an obscenity case. The Court must still find a referent for "obscenity."

2. *Obscenity is utterly without redeeming social importance and is thus not within the protection of the First Amendment.*

To test this second postulate, it can of course be assumed that "obscene" writings under either the 18th Century definition or that adopted in *Roth* are without redeeming social importance. But if that be the measure by which the Court is to keep the First Amendment vital, of what good is it? Certainly, no one can be silenced merely because his words are without social importance. A casual glance at the evening hours of television more than proves this point.

It is respectfully submitted that there exists absolutely no authority for the contention that the protections of free speech and press adhere only to words of social value or importance. Even if the purpose of the First Amendment was to promote the advancement of truth, science, morality, and arts in general,[9] this purpose cannot be cited as authority for including within First Amendment protection only those words that have that effect. The

9. 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774), quoted in *Roth* at 484.

thought of Milton in *Areopagitica* could not be more to the point:[10]

> "Good and evil we know in the field of this World grow up together almost inseparably; and the knowledge of good is so involved and interwoven with the knowledge of evil, and in so many cunning resemblances hardly to be discerned, that those confused seeds which were imposed on Psyche as an incessant labour to cull out, and sort asunder, were not more intermixed. It was from out the rind of one apple tasted, that the knowledge of good and evil as two twins cleaving together leaped forth into the World. And perhaps this is that doom which Adam fell into of knowing good and evil, that is to say of knowing good by evil. As therefore the state of man now is; what wisdom can there be to choose, what continence to forbear without the knowledge of evil? . . . Since therefore the knowledge and survey of vice is in this world so necessary to the constituting of human virtue, and the scanning of error to the confirmation of truth, how can we more safely, and with less danger scout into the regions of sin and falsity than by reading all manner of tractates, and hearing all manner of reason? And this is the benefit which may be had of books promiscuously read."

The postulate of "social importance," on scrutiny, must surely fail.

If the Court's second postulate gives us no aid, can the theory in *Roth* be yet sustained by reference to the third?

3. *Obscenity, as with other classes of utterances such as libel, may be excluded from the protections of the First Amendment because it encroaches upon a limited area of more important interests.*

We submit that this postulate too must fall, for the analogy to libel or other properly proscribed utterances is false.

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10. Milton, *Aereopagitica* in 4 THE WORKS OF JOHN MILTON 395, 411-12 (Pickering pub. 1851).

What is the unifying fabric of utterances properly placed outside the protection of freedom of speech?

Certainly the capability to cause injury or harm to another or to society is the essential factor. As Benjamin Franklin noted (A. H. Smyth, Writings of Benjamin Franklin, pp. 29-31 (1905)):

> "Without freedom of thought there can be no such thing as wisdom; it is the right of every man as far as by it he does not hurt or control the right of another; and this is the only check it ought to suffer, and the only bond it ought to know. . . .Who ever would overthrow the liberty of a nation must begin by subduing the freeness of speech: a thing terrible to public traitors."

In the first American edition of *Treatise on the Law of Slander* by Thomas Starkie (1826), the author observed that "some limit should be prescribed to communications affecting the reputation of individuals." For "the happiness and prosperity of the individual [may be] impaired by imputations disgracing him as a man, and depriving him of the comforts of society; or affecting his credit and abilities in any particular character, and excluding him from the enjoyments of the honours and emoluments instanter to his satisfaction in life." The author concluded that "since experience proves, that such may be the fatal consequences of malice thus exerted, the means by which they are effected are properly the object of legal coercion and restraint." Pp. xxiii-xxiv.

As injury to reputation could be considered the gravamen of the offense in civil libel,[11] the traditional justification for punishing criminal libels was the "insulting or fighting words—those by which their very utterance inflict injury or tend to incite an immediate breach of the peace."[12]

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11. See STARKIE, TREATISE ON THE LAW OF SLANDER 17 (1826) and early English cases there cited.

12. *Beauharnais* v. *Illinois*, 343 U. S. 250, 256 (1952).

Another related class of utterances is that which creates a "clear and present danger of a substantive evil which the legislature has a right to prevent," and such danger which the legislature has a right to prevent is the "[o]verthrow of the government by force and violence, [which] is certainly a substantial enough interest for the government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected."[13]

It can be seen that in both these exceptions, and others that could be mentioned,[14] it is not the words themselves which give rise to their exclusion, but the results they bring about. It is the concern with results rather than words that forms the basis for placing these utterances outside the constitutional protection of free speech and press.

Nowhere in the majority's definition is there any reference to the "effects" of obscenity, or its tendency to encroach upon or be destructive of interests of the individual or State sufficiently substantial to warrant restriction of speech.[15] A perusal of cases concerning obscenity reveals that rarely is it shown or even offered to be shown that

13. *Dennis* v. *United States*, 341 U. S. 494, 509 (1951).

14. See, *e. g.*, *Valentine* v. *Christensen*, 316 U. S. 52, 54-55 (1941) (ordinance prohibiting distribution of advertising bills on city streets does not abridge freedom of press and speech); *Beard* v. *Alexandria*, 341 U. S. 622, 644-45 (1950) (ordinance prohibiting house-to-house solicitation with prior consent not an abridgment of First Amendment principles); *E. F. Drew & Co.* v. *FTC*, 235 F. 2d 735, 740 (2nd Cir. 1956) (no constitutional right to disseminate false or misleading advertisements).

15. Why is "obscenity" an exception to the rule announced in *Board of Education* v. *Barnette*, 319 U. S. 624, 633 (1943)? "It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish." It is respectfully submitted that the answer in *Roth* that it is because it is, 354 U. S. at 486, is insufficient.

obscene utterances have any measurable effect upon those to whom they are communicated, or that any injury or other damage results.[16] An analysis of these cases indicates that it is the words themselves rather than their effect that have erroneously led courts to exclude them from the protections of free speech and press. Such obscenity cases can not be equated with those involving false words causing damage. It is respectfully submitted that obscenity can only share a common fabric with other properly excluded classes of utterances when damage to the individual or to the State is demonstrable. As Justice Douglas pointed out 354 U. S. at 513, the majority definition, "does not require any nexus between the literature which is prohibited and action which the legislature can regulate or prohibit."

Absent such a nexus, the parallel reference to other properly excluded classes of utterances, such as libel, is unsound, and *Roth's* third postulate, we submit, is invalid.

B. The Standard Adopted in Roth is Not Constitutionally Adequate.

Even if, in the absence of supporting data, we were to agree with Justice Harlan that "the State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex will have an eroding effect on moral standards,"[17] it is still possible to describe with precision those utterances or other forms of speech legitimately within the police power of the states to proscribe. The writings and photographs sold surreptitiously on playgrounds or associated with "stags" are certainly subject to description. Other examples can be thought of. However, the statute that has emerged from this Court's

16. *United States* v. *Roth*, 237 F. 2d 796, 811.

17. 354 U. S. at 502.

definition in *Roth* is, we submit, completely lacking in precision, and thus not only fails to achieve its goal but is constitutionally inadequate.

This consititutional inadequacy is well demonstrated by review of this Court's decision in *Burstyn* v. *Wilson*, 343 U. S. 495 (1951) where it was held that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is "sacrilegious". Though the decision may well be interpreted as a ruling that, regardless of how exactly defined, sacrilege is not a class of utterances outside the protection of freedom of speech and press, nevertheless, the Court seemed to base its reasoning on the finding that "in seeking to apply the broad and all-inclusive definition of 'sacrilegious' given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies." The Court concluded that "New York cannot vest such unlimited restraining control over motion pictures in a censor." 343 U. S. at 505.

The learned concurring opinion of Justice Frankfurter in *Burstyn* is much in point, for after an intriguing and scholarly analysis of the meaning of the term "sacrilegious", he observed the imprecision of the word, and the danger involved in permitting its use in a proscriptive statute.

> "To allow such vague, undefinable powers of censorship to be exercised is bound to have stultifying consequences on the creative process of literature and art—for the films are derived largely from literature. History does not encourage reliance on the wisdom and moderation of the censor as a safeguard in the exercise of such drastic power over the minds of men. We not only do not know but cannot know what is condemnable by 'sacrilegious'. And if we cannot tell,

> how are those to be governed by the statute to tell?" 343 U. S. at 531.

Justice Frankfurter concluded that the term "sacrilegious" was patently in disregard of the constitutional requirements of definiteness, because it necessarily involved "subjective determination":

> "From all that has been said one is compelled to conclude that the term 'sacrilegious' has come down the stream of time encrusted with a specialized, strictly confined meaning, pertaining to things in space not things in the mind. The New York Court of Appeals did not give the term this calculable content. It applied it to things in the mind, and things in the mind so undefined, so at large, as to be . . . patently in disregard of the requirement for definiteness, as the basis of proscriptions and legal sanctions for their disobedience. . . ." 343 U. S. at 533.

The list of books banned, burned and exhorted against since man first learned to write evidences not only the ludicrous condemnation of some and the dangerous suppression of others, but also clearly indicates the varying and uncertain definitions of "obscene". The conclusion of Justice Harlan in *Roth* v. *United States* that constitutional standards of obscenity do not readily lend themselves to generalized definitions is, it is respectfully urged, a grave understatement. Obscenity is of no more easy definition than sacrilege, and when such definition, as in the one at bar, pertains to "things in the mind, and things in the mind so undefined," it suffers the same disability as that discovered by Justice Frankfurter in *Burstyn*.

This Court in *Roth* has created a definition, which California has adopted, that, we respectfully suggest, falls woefully short of the mark in terms of both precision and constitutional adequacy. In the last analysis, it vests in a jury the power to determine the nature of the "average person", the nature of "contemporary community stand-

ards" and what is more difficult and thus more dangerous, the power to determine what utterances are "utterly without redeeming social importance". Clearly, this is to set the jury adrift "upon a boundless sea amid a myriad of conflicting currents" and places upon them the power to censor. Obviously such a standard might have been applied to "sacrilegious", with just as unsatisfactory a result.

It is too easy a solution to say that "a jury trial . . . provides a peculiarly competent application of the standard for judging obscenity,"[18] or that "the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves."[19] As Judge Frank has well stated, "How does the judge [or judges, or justices] determine whether a book is obscene? Not by way of some sort of judicial notice, Whence come the judicial notice data to inform him?"[20]

As Starkie observed:

> "The advantage to the community would be infinite, could any organ of communication be discovered, which would faithfully transmit to the public every sentence capable of improving and delighting, but repress every gross and pernicious sentiment. The difficulty consists in discovering such a literary alembic. In whom are united the talents requisite for the task? Does the possessor of them superadd an integrity and impartiality liable to no influence, prejudice, or bias? Who is competent to judge of such high qualifications? Where shall the power of appointment reside?" Pp. xxiv-xxv.

If, as this Court recognized in *Roth*, "there may be marginal cases in which it is difficult to determine the side of

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18. *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 448 (1957) (dissenting opinion).

19. 354 U. S. at 497 (concurring opinion).

20. *United States* v. *Roth*, 237 F. 2d 796, 822.

the line on which a particular fact situation falls,"[21] on what basis will this Court select those marginal cases which it will decide, which cases it will permit lower courts to decide? Are any of these forums, in the last analysis, justifiably empowered to determine what can and what cannot be read? Who is to be the arbiter, final or otherwise, carrying with him the sanction of law and the power to imprison, as to what is "utterly without redeeming social importance?" To excuse an attempted resolution of this problem by claiming that "no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States,"[22] or in one of our courts, or in one of our generations, seems impermissible in light of the wording of the First Amendment and the absence of evidence that there is "encroachment on more important interests."

For every book of value that finds its way to this Court and is thus saved for posterity there may well be a thousand others not so fortunate, but just as deserving. We submit that the danger involved to the freedom of press and speech and to literary heritage greatly outweighs the evil toward which statutes such as the one at issue are directed. "Who kills a Man kills a reasonable creature, Gods Image; but he who destroys a good book, kills reason itself, kills the Image of God . . . revolutions of ages do not oft recover the loss of a rejected truth."[23]

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21. 354 U. S. at 491, quoting *United States* v. *Petrillo*, 332 U. S. 1, 7 (1947).

22. 354 U. S. at 506 (concurring opinion of Justice Harlan).

23. Milton, *supra* at 400.

II.

NO JURY, JUDGE OR COURT SHOULD BE GIVEN THE POWER TO CONDEMN A BOOK AND IMPRISON ITS AUTHOR, PUBLISHER, SELLER AND EXHIBITOR MERELY ON THE BASIS THAT THE BOOK IS OFFENSIVE.

In the last analysis, the definition in *Roth* gives to some who find themselves offended by what they read the power to imprison. Granted not all so offended will find themselves within a jury box or behind the judicial bench, but such power placed in those who do presents a real and frightening danger. Are there not more appropriate safeguards against offensive literature? It is respectfully submitted that they abound and are compatible with and promotive of the values and goals of our Constitution and system of government.

Though the literary merit of Henry Miller's *Tropic of Cancer* has been attested to by many scholars and critics,[24] it is not the purpose of this *amicus* to take sides in evaluating the book in terms of literature. However, we unequivocally believe in the right of the individual to read or reject any book. In the exercise of self-determination in this respect, the individual rejects many books because they are dull, because they fail to speak to him in terms of his own experience, background, or interest, or because they offend his sensibilities. Let him who is offended put down the book he finds offensive and let him warn others of what he has found. In a great sense, this function is not solely that of the professional critic, or librarian, or any one who pretends experience and knowledge in evaluating literature, but, rather, it is the function of any one who can read, and on the basis of that reading, voice opinions.

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24. See, e. g. Appendix I of defendant's Petition for Writ of Certiorari filed herein.

> "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter. Her confuting is the best and surest suppressing."[24a]

With all due respect to Mr. Chief Justice Warren's view in *Roth*, 354 U. S. at 495, the dubious protection of the requirement of *scienter*,[25] does not always place the individual, rather than the book on trial.[26] The California legislature, following to the letter the definition of obscenity urged by this Court in *Roth*, has empowered a jury or judge to decide, according to their own conscience, whether a particular book shall be read.

The standard adopted in *Roth* and contained in the California statute is so vague and so subject to arbitrary application as to constitute an unconstitutional delegation of legislative power. Surely a state legislature cannot permit a jury to decide for themselves what items can or cannot be sold in commerce. Exercising its police power, the legislature can proscribe the sale or use of narcotics, alcoholic beverages, gambling devices and the like. What item or items are to be proscribed is a decision to be vested in the legislature, and having so described them, a jury determines whether they were in fact used or sold. The legislature does not permit the jury to decide which items

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24a. Milton, *supra* at 443.

25. Section 311(e) of the California Penal Code requires that for conviction a defendant must have had knowledge that the matter is obscene.

26. Section 311.2 of the California Penal Code applies to anyone who prepares, publishes, prints, exhibits or distributes obscene matter. Obviously, a determination in a relevant jurisdiction that a particular book was obscene would be a virtual embargo on that book in that jurisdiction, and injunctive action against a publisher or printer would result in an absolute embargo.

subject to use or sale are to be banned. Because the definition of obscenity, as set forth by this Court in *Roth* and resultantly by the California legislature, is so meaningless, it in effect gives juries the power to define the subject matter of the crime. It is submitted that there is no authority for the delegation of this power, even if freedom of speech were not at issue.

United States v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921) is exactly in point on this question. In the opinion below, 264 Fed. 218 (E. D. Mo. 1920), the Court held as unconstitutionally vague a criminal statute making it "unlawful for any person . . . wilfully to make any unjust or unreasonable charge in handling or dealing in . . . necessaries."

> " 'Congress alone has power to define crimes against the United States. This power cannot be delegated either to the courts or to the juries of this country.' . . . .
>
> "If this law is to stand, then no longer would there seem need of defining crimes by separate statutes. All that will be necessary will be to pass a single sweeping statute, declaring that any person who shall commit any unjust or unreasonable act, or a wrongful, or criminal act, shall be deemed guilty of a felony, and leave it to the jury to determine what is unjust, or unreasonable, wrongful, or criminal." 264 Fed. at 220-223.

The Supreme Court, in affirming, recognized this unconstitutional delegation of authority:

> "[W]e see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." 255 U. S. at 89.[27]

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27. See, also, *State* v. *Truby*, 29 So. 2d 758 (La. 1947) (statutory use of word "immoral" held unconstitutional delegation of authority to Courts) and cases cited therein.

No matter how hallowed the institution of a jury, to permit twelve "average persons applying contemporary standards" to decide what is "utterly without redeeming social importance" and thus to determine the literary fate of any manuscript is to entrust them with frightening authority and we submit should be unthinkable. That such a determination is subject to judicial review affords little comfort, for the judicial robe, with all due respect, does not carry with it a guaranty of wisdom.

Obviously a contemporary jury might well have found that "to the average person, applying contemporary standards, the predominant appeal, taken as a whole", of Ovid, St. Augustine, Shakespeare, Voltaire, Rabelais, Mark Twain or Aldous Huxley "was to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which [went] substantially beyond customary limits of candor in description or representation of such matters and [was] matter . . . utterly without redeeming social importance."

We may agree or disagree with Mrs. Ann Smart that Steinbeck's *A Russian Journal* or Pearl Buck and Eslanda Robeson's *American Argument* are obscene.[28] We may be in accord or not with complaints of the good people of Fall River and Lowell, Massachusetts that an issue of *Life* magazine containing 14 photographs of famous statues and paintings of nude or partly nude women was obscene.[29] We may smile or not at the woman exclaiming, upon reading an account of Plato's proposals in *Living Biographies of Great Philosophers* by Henry and Dana Lee Thomas, that she could not help but believe that the book was "one reason why we have so many sex maniacs walking about."[30]

28. See 10 NEWSLETTER ON INTELLECTUAL FREEDOM (published by the American Library Association) No. 1, p. 5 (1961).

29. See 5 *id.* No. 2, p. 1 (1956).

30. See 10 *id.* No. 2, p. 3 (1961).

The dissatisfied parents who approached the North Little Rock School Board complaining that *Exodus* by Leon Uris should not be made available because "certain passages were filthy reading", are welcome to their opinions.[31] Equally so is the group of parents who saw danger to the morals of the nation presented by *The Scarlet Letter*, *The Good Earth* and *Drums Along the Mohawk*.[32]

There are those who claim bad taste and immorality present in the book, *A History of the United States from the Age of Exploration to 1865* by Hugh T. Leffler, in its four page description of the old Puritan custom of bundling,[33] and they are free to refuse to let their children read it. Whether Anne Frank's *Diary* is "filthy" for adults to read,[34] or Edgar Rice Burrough's *Tarzan*, and Zane Grey's works should be condemned because the Ape Man and Jane were ostensibly living together without benefit of a church wedding[35] and Zane Grey used corrupting language such as "hell" and "damn"[36], might be suitable topics for debate. Certainly Dr. Leslie Weatherhead, former president of the Methodist Conference of England may wax eloquent in favor of censoring the Bible to excise from it "a lot of bloody massacres and a lot of smutty passages that choir boys read on the quiet."[37]

There might be point in discussing whether Samuel Coleridge was correct in his contention that "Shakespeare's words are too indecent to be translated . . . His gentlefolk's talk is full of coarse allusions such as nowadays you could hear only in the meanest taverns."[38]

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31. See 11 *id.* No. 3, p. 5 (1961).
32. See 11 *id.* No. 1, p. 3 (1962).
33. See *id.* p. 5.
34. See *id.* p. 7.
35. See *ibid.*
36. See *ibid.*
37. See 11 *id.* No. 3, p. 27 (1962).
38. See HAIGHT, BANNED BOOKS 25 (2 ed. 1955).

We may, in turn, voice our criticism of the Brooklyn Public Library in 1876 for excluding from the children's room the *Adventures of Tom Sawyer*.[39] We may find paradox in the fact that in 1930 *An American Tragedy* was required reading for a Harvard English course, when across the river the Supreme Court of Boston fined its publisher $300.00.[40] We may praise the United States Attorney, David C. Acheson, for his criticism of the vagueness of proposed legislation making criminal the dissemination of "intrigues between men and women" in noting that Romeo and Juliet might, therefore, be banned.[41]

Such is the nature of the market place of ideas. The diversity of taste and of opinion, particularly in the area of speech and writing, remains a stimulus to thoughtful, creative expression. The danger arises only when one taste or one opinion carries with it the sanction of law and the power to ban. The danger is obvious with a jury of Ann Smarts, Plato critics, Dr. Weatherheads, Coleridges and Fall River citizens. What would be the fate of *Gargantua* or *Candide* or *The Decameron* had there been such a panel? It is submitted that our libraries and our heritage might be reduced to "The Rabbit's Wedding" and it is conceivable that some jury could bring in a finding of guilty on that "work."[42] As Milton asked, "Why should we then affect a rigour contrary to the manner of God and of nature, by abridging or scanting those means, which books freely permitted are, both to the trial of virtue and the exercise of truth?"[43]

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39. See *id.* at 66.

40. See *id.* at 81.

41. See 10 NEWSLETTER No. 3, p. 6 (1961).

42. A children's book, THE RABBIT'S WEDDING by [Garth Williams] was objected to in Texas because one rabbit was white and the other black. See 5 FREEDOM-TO-READ BULLETIN, No. 1, p. 10 (1962), published by the American Book Publisher's Council, Inc.

43. Milton, *supra* at 419.

The individual views of our hypothetical jurymen, regardless of how atypical or lacking in wisdom, are entitled to be heard. It is a different matter altogether to grant such individuals the right to condemn and imprison by giving them the right to decide what is obscene, what is prurient and what is socially unimportant.

Again as Milton observed

> "If every action which is good, or evil in man at ripe years, were to be under pittance, and prescription, and compulsion, what were virtue but a name, what praise could be then due to well-doing, what gramercy to be sober, just or continent? many there be that complain of divine Providence for suffering Adam to transgress, foolish tongues! when God gave him reason, he gave him freedom to choose, for reason is but choosing; he has been else a mere artificial Adam, such an Adam as he is in the motions."[44]

No solace may be found in the contention that "one of the consequences we accept under our jury system [is that] different juries may reach different results under any criminal statute."[45] By no statute should the jury or the Court be entitled to define the subject matter of the crime.

Criticism and resistance to superimposed conformity is not a new vocation or recently discovered need:

> "How many other things might be tolerated in peace, and left to conscience, had we but charity, and were it not the chief stronghold of our hypocrisy to be ever judging one another. I fear yet this iron yoke of outward conformity hath left a slavish print upon our necks; the ghost of a linen decency yet haunts us. We stumble and are impatient at the least dividing of one visible congregation from another, though it be not in fundamentals; and through our forwardness to suppress, and our backwardness to recover any enthralled

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44. *Id.* at 418.

45. *Roth, supra*, 354 U. S. at 492, fn. 30.

> piece of truth out of the gripe of custom, we care not to keep truth separated from truth, which is the fiercest rent and disunion of all."[46]

The problem of how ideas should be expressed, what books should be published and sold, what books should be purchased and read is not one of easy answer. One need go no further than the decisions of this Court pertaining to books to realize the complexity of the problem.

Amicus submits, however, that the solution lies not in the courts, but in the marketplace of ideas. There are a myriad of groups seeking to influence the attitudes, opinions and behaviors of others. The world of literature, in company with other worlds of expression, lives in an environment of pressure groups that have arisen because they satisfy some social need. They perform useful as well as objectionable functions. But the very basis for the right of association and freedom to express opinion is the conviction that such freedom to advocate ideas, such competition to have public support and approval, is best calculated to insure an enlightened public opinion and wise public policy.[47]

---

46. Milton, *supra* at 444-5.

47. "The area set off for individual freedom by the Bill of Rights was marked by boundaries precisely defined. It is my belief that the area so set off provides an adequate minimum protection for the freedoms indispensable to individual liberty. Thus we have only to observe faithfully the boundaries already marked for us.

". . . As I understand it, this Court's duty to guard constitutional liberties is to guard those liberties the Constitution defined, not those that may be defined from case to case on the basis of this Court's judgment as to the relative importance of individual liberty and governmental power. The majority's approach makes the First Amendment, not the rigid protection of liberty its language imports, but a poor flexible imitation . . . . The Founders of this Nation were not then willing to trust the definition of First Amendment freedoms to Congress or this Court, nor am I now."

Branden v. *United States*, 365 U. S. 431, 438, 444-45 (1961) (dissenting opinion of Black, J.).

Along side these pressure groups, or more accurately in front of them, stand authors, publishers, book sellers, libraries and ultimately the reading public. In a democratic society, these groups gathering whatever support they may from professional scholars and critics are, in the last analysis, the most satisfactory means of persuading the author, publisher, seller, library and reading public of what should or should not be written or read.

As *Starkie* has pointed out, "the advantage to the community would be infinite, could any organ of communication be discovered which would faithfully transmit to the public every sentence capable of improving and delighting, but repress every gross and pernicious sentiment."[48] Of the many voices to be heard, which are to be listened to?

Though *amicus* does not hold itself out as a paragon of wisdom in adopting a policy of what is to be read, what is to be skimmed and what is to be discarded, the following basic policies are advocated for its members:

1. As a responsibility of library service, books and other reading matter selected should be chosen for values of interest, information and enlightenment of all the people of the community. In no case should any book be excluded because of the race or nationality or the political or religious views of the writer.

2. There should be the fullest practicable provision of material presenting all points of view concerning the problems and issues of our times, international, national, and local; and books or other reading matter of sound factual authority should not be proscribed or removed from library shelves because of partisan or doctrinal disapproval.

3. Censorship of books, urged or practiced by volunteer arbiters of morals or political opinion or by organizations that would establish a coercive concept of Americanism, must be challenged by libraries in main-

48. STARKIE, *supra* at xxiv.

tenance of their responsibility to provide public information and enlightenment through the printed word.[49]

Other equally responsible organizations are concerned with the value and protection of our literary heritage. It is respectfully submitted that the arena in which these groups and the persuasive pressures to which they are subject interact is the only proper forum for a determination of what should or should not be read. It is faith in the democratic process and its institutions that creates "confidence in the ability of our people to reject noxious literature [and] their capacity to sort out the true from the false in theology, economics, politics or any other field."[50]

Is this not then, rather than the jury or the judge, the best literary alembic?

> "And again, if it be true, that a wise man like a good refiner can gather gold out of the drossiest volume, and that a fool will be a fool with the best book, yea or without book, there is no reason that we should deprive a wise man of any advantage to his wisdom, while we seek to restrain from a fool, that which being restrained will be no hindrance to his folly.
>
> . . . .
>
> "They are not skilful considerers of human things, who imagine to remove sin by removing the matter of sin; for, besides that it is a huge heap increasing under the very act of diminishing, though some part of it may for a time be withdrawn from some persons, it cannot from all, in such a universal thing as books are; and when this is done, yet the sin remains entire. Though ye take from a covetous man all his treasure, he has yet one jewel left, ye cannot bereave him of his covetousness. Banish all objects of lust, shut up all youth into the severest discipline that can be exercised in any hermitage, ye cannot make him chaste, that came

49. Library Bill of Rights, adopted and amended by the American Library Association Council, Feb. 1, 1961.

50. *Roth, supra*, 354 U. S. at 514 (dissenting opinion of Douglas, J.).

not thither so; such great care and wisdom is required to the right managing of this point.

. . . .

"Impunity and remissness, for certain are the bane of a Commonwealth, but here the great art lies to discern in what the law is to bid restraint and punishment, and in what things persuasion only is to work."[51]

CONCLUSION.

To call a book obscene is to apply a label that has no semantic referent. To conclude that a book has no social importance answers no First Amendment problem. In such areas, the persuasion of public opinion should be the only acceptable censor. Only where a book or writing is shown to damage society or one of its members wrongfully—be it libelous, seditious, or "obscene"—should freedom of the press give way to more important social interests and Government have the power to restrain and punish. No such test having been applied by the court below, or required by Section 311 of the California Penal Code, the judgment of the court below should be reversed.

Respectfully submitted,

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51. Milton, *supra* at 414-419.

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IN THE

Supreme Court of the United States

October Term, 1963
No. 72

BRADLEY R. SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA.

On Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California in Support of Petitioner.

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BRADLEY R. SMITH,

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PEOPLE OF THE STATE OF CALIFORNIA.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California in Support of Petitioner.

This brief is filed with the consent of both parties pursuant to Rule 42(2) of this Court. The written consents are being forwarded to the Clerk of this Court concurrently herewith.

Interest of Amicus Curiae.

The American Civil Liberties Union of Southern California is a non-profit membership corporation dedicated to the preservation of, *inter alia,* the constitutional right to freedom of expression and due process of law. It believes that freedom of expression is indispensable under our constitutional system. It believes that the suppression of the book, Tropic of Cancer, as has been done here by criminally prosecuting and convicting a bookseller who, along with other books of all kinds, offers the book for sale to those members

of the public who desire to read it, violates fundamental rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.

This is not the first time the ACLU has contended that the book cannot constitutionally be suppressed. More than a decade ago, then by the Northern California affiliate, and prior to this Court's clarification of the law in *Roth v. United States,* 354 U. S. 476, it was so contended (*United States v. Two Obscene Books,* 99 F. Supp. 760 [N.D. Cal. 1951], affd. sub. nom. *Besig v. United States,* 208 F. 2d 142 [C. A. 9 1953]).[1] And it was so contended by the attorneys for amicus as attorneys for plaintiffs and appellants in *Zeitlin v. Arnebergh,* 59 A. C. 930, 383 P. 2d 152, 31 Cal. Rptr. 800.

Hence this brief.

I.

Since the First Amendment Prohibits the Banning of a Book Which Is Not "Utterly Without Redeeming Social Importance", the Conviction Here for Selling the Book "Tropic of Cancer" Cannot be Sustained.

We agree with the argument made in other briefs in this case and in *Jacobellis v. Ohio,* No. 11, this term, that the basic concept that obscenity, however that may be defined, is not protected by the First Amendment and that words written which fall within

[1]Since those cases, the United States has reversed the position it there took and has agreed through both the Customs Service (*United States v. Three Books,* Civ. No. 610685, U.S.D.C. E.D. N.Y., consent order of Aug. 15, 1961) and the Post Office Department (N.Y. Times, June 14, 1961) that the book is not obscene and cannot be denied entry into the country nor transmission through the mails.

that "definition" are not to be judged by the same standards as words written on other subjects, should be re-examined and rejected. In this brief, however, we shall briefly point up that even within the *Roth-Alberts* standard, the conviction below cannot stand.

The dismal chronicle of writings which have been banned over the years[2] attests to the fact that under the First Amendment and under *Roth v. United States,* 354 U. S. 476, the censor's ax cannot be permitted to fell so serious a work of literary merit as "Tropic of Cancer".

In *Roth,* this Court, admonishing that "the door barring federal and state intrusion into this area (of free speech and press) . . . (may be) opened only the slightest crack," (354 U. S. at 488) held that "(a)ll ideas having even the slightest redeeming social importance . . . have the full protection of the guarantees." (354 U. S. at 484). It is for this reason that it held obscenity not to be protected by the First Amendment, for "obscenity (is) utterly without redeeming social importance." (*ibid.*). Conversely, this also makes clear that a work cannot constitutionally be held to be obscene if it is not utterly without redeeming social importance. That is to say, if a work has *some* redeeming social importance, it cannot, in the very nature of things and according to the plain meaning of the English language, be utterly with-

[2]From Homer to Dante, to Galileo, to John Milton, to Jonathan Swift and to Thomas Paine; to Goethe, Shelley and Heinrich Heine; to Charles Darwin and Harriet Beecher Stowe; to Walt Whitman, Flaubert and Ibsen; to Emile Zola, Anatole France and de Maupassant; to Theodore Dreiser, Upton Sinclair and James Joyce; to Eugene O'Neill, Aldous Huxley and William Faulkner. (See "Banned Books" by Ann Lyon Haight [R. R. Bowker Co., 2d Ed., 1955].)

out redeeming social importance. Or, put another way: "utterly" means "utterly", and "utterly without" means precisely that.

This is clear not only as a matter of the definitions of words,[3] but is likewise the meaning which the courts have given to the words, "utter" or "utterly" when they have had occasion to construe those words.

Thus, in *The Delaware Mutual Safety Insurance Company v. Grossler,* 96 U. S. 645, 24 L.ed 863, a maritime bond provided that "if in the course of the voyage, an utter loss of the vessel by . . . accidents or casualties of the sea or navigation, shall unavoidably happen, then the loan and interest shall not be payable; . . ." The vessel, en route from Java to Boston, was caught up in a storm, wrecked and driven ashore on Cape Cod. So much was the damage to the ship that the cost of repairs would greatly exceed her value when repaired. So the vessel was not repaired and the claim was made that the money was not payable because the ship had been "utterly lost". This Court ruled against this contention, thus giving to the words "utterly lost" the normal meaning they convey (24 L.ed at 866):

> "Unless the ship be actually destroyed, and the loss to the owners absolute, it is not an utter loss within the meaning of such a contract. If the ship still exists, although in such a state of damage as to be constructively totally lost, within the meaning of a policy of insurance; . . . she is not utterly lost, . . ."

---

[3]Webster's Third New International Dictionary defines utterly as "in an utter manner: to an absolute or extreme degree: to the full extent: absolutely, altogether, entirely, fully, thoroughly, totally". Black's Law Dictionary, 4th Edition, does not contain a definition of the adverb, utterly, but defines the adjective, utter, as "entire, complete, absolute, total".

And again (24 L.ed at 867):

> ". . . Nothing short of a total loss will discharge the borrower . . ."

And (24 L.ed at 868):

> ". . . (I)f the ship exists *in specie*, though in a state which would warrant an insured to make an abandonment, as where the cost of repairs would greatly exceed the value when repaired, the lender on bottomry may still recover; for the ship must be absolutely and wholly destroyed, in order to discharge the borrowers . . ."

In accord is *Insurance Company of Pennsylvania v. Duval*, (Pa) 8 Serg. & R. 138, 148.

Similarly, when a statute makes "utter desertion" a ground for divorce, the words mean just that and not something short thereof. In *Moody v. Moody*, 118 Me. 454, 456, 108 Atl. 849, speaking of the meaning of such a statute, the court said:

> ". . . We apprehend that the word 'utter' is used in its ordinary acceptation, 'entire and complete, absolute, total;' utter desertion involves an 'abnegation of all the duties and obligations resulting from the marriage contract.' . . ."

And so when a wife refused without good cause to have sexual intercourse with her husband, the court refused to grant a divorce on the ground of "utter desertion", because "(s)exual intercourse is only one marital right or duty." (*Stewart v. Stewart*, 78 Me. 548, 552, 7 Atl. 473). Distinguishing cases which

have granted divorces for such conduct on the ground of "desertion", the court said (*ibid.*):

> ". . . There is a difference between the statutes of those states, and our statute. Our statute uses the phrase, 'utter desertion'. The statutes upon which the opposing decisions are based, omit the word, utter. . . ."

In *Pearsall v. Chapin,* 44 Pa. St. 9, 8 Wright 9, where the statute made certain alienations by bishops and other ecclesiastics and certain forms of alienation of entailed estates void, absolutely void, or utterly void, the court said (p. 14):

> ". . . The word *absolutely,* here (is) being used not as contrasted with *relatively,* but as equivalent to *utterly.*" (emphasis in original)

It is submitted, therefore, that with the place "Tropic of Cancer" has made for itself as a work of serious literature, it simply cannot be held that "Tropic" is "absolutely", "altogether", "entirely", "fully", "totally", "completely" without redeeming social importance; to do so would defy all logic as well as law. Amicus is aware that there were witnesses for the respondent in this case, who were of the view that the book is obscene. But the witnesses for the petitioner testified contrariwise. Because of the stringent standard, "utterly without redeeming social importance", which the respondent must meet, with this reputable body of testimony as to the book's worth in the record, it simply cannot be held as a matter of constitutional law that the State has met its burden. This is not a question of the jury having resolved a "conflict of evidence". The determination which must be made is

one of constitutional fact. As to such a determination, this Court makes its own judgment, especially when free speech is involved (*Wood v. Georgia,* 370 U. S. 375, 386; *Burstyn v. Wilson,* 343 U. S. 495, 506-7, conc. op.), and particularly when the question of obscenity is involved. See this Court's latest decision on the subject (*Manual Enterprizes v. Day,* 370 U. S. 478, 488.)

See also Mr. Justice Harlan, concurring and dissenting, in *Roth v. United States,* 354 U. S. 476, 497-8.

The court below, in allowing suppression of the book, has permitted transgression against that most sensitive of constitutional rights: the public's right to read (*Cf. Smith v. California,* 361 U. S. 147, 154).

Conclusion.

The judgment below should be reversed.

Respectfully submitted,

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IN THE

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BRADLEY REED SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT.

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Respondent.

BRIEF OF RESPONDENT.

Reference to Official Reports.

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, is unreported. It appears at pages 109 to 117 of the certified record, and a copy is attached as Appendix A.

Constitutional and Statutory Provisions Involved in the Case.

The case involves the First and Fourteenth Amendments to the Constitution of the United States, Sections 311 and 311.2 of the California Penal Code, and portions of Title 17, Section 1 of the United States Code on registration of copyrights. The pertinent portions of the provisions are set forth as Appendix B.

Questions Presented for Review.

Whether a book, *if copyrighted*, is entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States.

Whether this Court is to abandon the rule expressed in *Roth v. United States* and *Alberts v. California* (54 U. S. 476), that obscenity is not within the area of constitutionally protected speech or press, in favor of a new rule giving absolute freedom of expression in the field of obscenity and pornography.

Whether, if that rule of *Roth-Alberts* is retained, the California statutes in question meet the other constitutional requirements set forth in such cases.

Whether, if the California statutes are valid, the book *Tropic of Cancer*, by Henry Miller, copywrited by Grove Press, Inc., may be held obscene under such statutes without violating the First and Fourteenth Amendments to the Constitution of the United States.

In an obscenity case, what weight this court will attach to the determination of the contemporary community moral standards as shown by the guilty verdict of a jury returned after the expiration of a very thorough twenty-seven days' trial.

Statement of the Case.

Petitioner was charged in a verified complaint, filed in the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California, with violation of Section 311.2 of the Penal Code of the State of California. [R. 2.] Such complaint alleged that petitioner, on October 9, 1961, did wilfully, unlawfully and knowingly exhibit and distribute . . . ob-

scene matter, to wit, the book *Tropic of Cancer* by Henry Miller. He was duly arraigned and entered a plea of not guilty. His jury trial commenced January 15, 1962. After twenty-seven trial days, on February 23, 1962, the jury returned a verdict of guilty.

In the course of such trial, petitioner's knowledge of the obscenity of the book (as required by *Eleazar Smith v. California*, 361 U. S. 147), was established by oral testimony and by People's Exhibit 1—a transcript of a tape recording of a conversation between petitioner and the arresting officer prior to the arrest.[1]

The book *Tropic of Cancer* was received in evidence and read to the jury. Thereafter, plaintiff produced and qualified as experts, eighteen witnesses who testified that in their opinion *Tropic of Cancer* was utterly without redeeming social importance and obscene as the term is defined in California Penal Code Section 311(a). They were:

LEON URIS. Author of *Exodus.*

DR. FRANK BAXTER. Lecturer and television personality. Professor Emeritus of English and American Literature.

---

[1]People's Exhibit 1, a transcript of a tape recording of a conversation between petitioner and the arresting officer prior to arrest, admitted in evidence Rep. Tr. Vol. 1, p. 81, lines 9-11: (original page numbering)

Question [by arresting officer, at p. 1, lines 16-17]:
You say it [Tropic of Cancer] is obscene?
Answer (by petitioner): It's obscene.
Question [by arresting officer, at p. 4, lines 13-17]
I didn't see this [Tropic of Cancer] for sale down on the the street? That's why . . .
Answer (by petitioner): We don't sell it down there.
Question: How come?
Answer: It's obscene.

MRS. C. H. CULBERTSON. President of the State of California Congress of Parents and Teachers.

ARTHUR J. KATES. Owner of Sunset News Company, the largest distributor of periodicals in California.

RABBI ERNEST R. TRATTNER.

DR. MARCUS CRAHAN. Psychiatrist and Physician and Surgeon. Medical Director of the Correctional Facilities of Los Angeles County. A regular supporter of such libraries as Princeton, Syracuse, Claremont, Occidental and California at Berkeley.

DR. C. C. TRILLINGHAM. Los Angeles County Superintendent of Schools.

DR. RAYMOND LINDQUIST. Senior Minister of Hollywood First Presbyterian Church.

DR. HOWARD S. McDONALD. President of Los Angeles State College.

MRS. ELIZABETH LEWIS. Member of Board of Trustees, California Women's Prisons.

FATHER CLARENCE E. CROWTHER. Senior Episcopal Chaplain, University of California at Los Angeles.

DR. ELLIS A. JARVIS. Retired Superintendent of Schools, Los Angeles City School District.

MARIE LOUISE KEARNS. Author, lecturer, book reviewer, and teacher of creative writing.

DR. WARREN S. JONES. Chairman of the Department of Speech and Dramatic Arts, Pepperdine College, Los Angeles.

THOMAS A. DEVINE. Professor of Sociology, Pierce College, Los Angeles.

JOHN OTIS CARNEY. Professional writer.

MRS. EDITH STAFFORD. Past President, Los Angeles City Board of Education.

DR. JOSEPH PAUL DeRIVER. Psychiatrist and Physician and Surgeon. Author of the published books, *The Sexual Criminal and Crime*, and *The Sexual Psychopath.*

Exerpts from the testimony of these witnesses are set out in Appendix C.

The defense produced a number of witnesses in accordance with the ruling of *In re Harris*, 56 Cal. 2d 879, 366 P. 2d 305, who testified to a contrary opinion.

Following the guilty verdict, petitioner was granted probation on condition he serve the first thirty days of the probationary period in jail.

The Appellate Department of the Superior Court of the State of California for the County of Los Angeles affirmed the judgment.

Summary of Argument.

In that the book *Tropic of Cancer* has been copyrighted, it is not entitled to the protection of the First Amendment. When an author or publisher avails himself of the right to copyright his works, he has converted such works into property. By so doing he has removed it from the public domain and prohibits others from exercising any freedom to utilize it. No one may validly claim *both* the constitutional guarantee of Free Speech and Press, and the exclusive right to do what such constitutional guarantee grants to all.

Even assuming that copyrighted material is within the area of free speech, the rules expressed by this

Court in *Roth-Alberts* and *Manual Enterprises v. Day* (370 U. S. 478) are adequate to suppress obscenity yet give full meaning to the First Amendment to the Constitution. They should not be abandoned to a concept of absolute freedom to express obscenity.

The California obscenity laws are constitutional, following closely the views expressed by this Court in *Roth-Alberts*. The definition of obscenity as material which ". . . to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest," does not dull the protection afforded by the First Amendment by use of the term "average person". The inclusion of such term is obviously but to forestall the determination of the character of material according to the views of extremists. The term "contemporary standards" was used in its most general sense and not limited to the community of Los Angeles, as the California law does not include the term "community".

In the trial of the action each side was given opportunity to establish the character of the material in question by use of expert witnesses. The opinions of such experts as were accepted by the jurors through the expression of their verdict are entitled to the most careful attention in this Court. Such opinions voiced under oath and tempered by relentless cross-examination clearly establish *Tropic of Cancer* to be obscene and utterly without redeeming social importance.

While appellate courts may of course indulge in independent judicial review of material adjudged obscene in the lower court, the verdict of a jury strengthed by extensive consideration of expert testimony should be given due respect by this Court.

ARGUMENT.

I.

The Constitutional Guarantee of Freedom of Speech and Press Does Not Protect Copyrighted Material.

The First Amendment to the United States Constitution prohibits Congress from making any law abridging the freedom of speech or of the press. This basic right of Free Speech, in its true concept, is equally available to all. Everyone may speak, print, publish or distribute whatever is within the constitutional realm of Free Speech. The right of Free Speech is not limited to original utterances. To so construe the right of Free Speech would largely destroy this right as few people ever utter original expressions.

One man's right of Free Speech is as great as that of the next. It extends to all.

The "publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms. It is of course no matter that the dissemination takes place under commercial auspices." (*Eleazar Smith v. California*, 361 U. S. 147.)

With these basic principles all must now agree.

Now let us consider one salient fact. *Tropic of Cancer*, the book here involved, was copyrighted in 1961 by Grove Press, Inc.

Title 17, Section 1 of the United States Code Annotated, reads in part:

Chapter 1 — Registration of Copyrights

> Sec. 1. Exclusive rights as to copyrighted works
> "(a) To print, reprint, publish, copy, and vend the copyrighted work;"

Obviously, the grant of an exclusive right "to print, reprint, publish, copy, and vend the copyrighted work," as expressly provided in the above section of the United States Code, abridges the right of others to enjoy the right of Free Speech and Press, which includes "publication and dissemination of books and other forms of the printed word . . .", which acts "furnish very familiar applications of these constitutionally protected freedoms." (*Eleazar Smith v. California, supra.*)

If there is any conflict between the copyright law, enacted pursuant to the provisions of Article I, Section 8, of the Constitution, and Freedom of Speech and Press, as guaranteed by the First Amendment to the Constitution, the provisions of the amendment supersede those of the original Constitution. (16 C. J. S. 99, Sec. 26, Constitutional Law.) Further, under the enlightened philosophy of this day, if any such conflict exists, human rights, as guaranteed by the First Amendment, must prevail over property rights provided for by Article I, Section 8.

Consequently, either all copyright law is invalid as an unconstitutional impingement on the rights of Free Speech and Press of those whose rights to publish and disseminate the copyrighted material are purportedly restricted by the copyright, or else any material that is copyrighted is thereby removed from the realm of Free Speech.

The conclusion that copyrighted material is removed from the realm of free speech is consistent with, in fact is compelled by, the constitutional provision authorizing Congress to enact a copyright law.

Article I, Section 8, of the United States Constitution, reads in part:

> "Section 8. The Congress shall have power . . . to promote the progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive right to their respective writings and discoveries."

Obviously, the framers of our Constitution did not intentionally create an inherent inconsistency within its terms by on the one hand providing for the creation of an exclusive property right in written material, and on the other hand protecting the right of all to exercise Free Speech and Press including, *on an equal basis to all*, the right to publish and disseminate books and other forms of the printed word.

As further evidence of the intent to provide for two separate and distinct rights, the one a property right and the other Free Speech, it is significant that it is only for "limited times" that such property right may be granted.

As has been well said,

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'." (*Mazer v. Stein*, 347 U. S. 201.)

From this it is clearly evident that, while willing to thus encourage the creation of literary efforts, the framers of our Constitution were unwilling that such works should permanently remain the property of the author or his assignee. Consequently, they provided for an exclusive property right, but further provided that this property right should be for "limited times."

This statutory right of copyright completely differs from the common law right of an author to his *unpublished* manuscript. It has long been recognized that under common law, as soon as the manuscript was published, it became common property. (*Little v. Hall*, 18 How. 165.) This, of course, is consistent with the right of Free Speech. But when pursuant to constitutional authority Congress grants to a copyright holder the "exclusive" right "to print, reprint, publish, copy, and vend the copyrighted work," which right continues *after* publication, then such right is totally inconsistent with Free Speech.

By providing for such a copyright law the Constitution itself has made it optionally possible for an author to remove his manuscript from the realm of Free Speech, and convert it into property. This has been done with *Tropic of Cancer*.

By removal of copyrighted material from the realm of Free Speech it becomes property, and the property rights thereby created are protected by the Fourteenth Amendment to the Constitution.

"Free Speech" is diametrically opposed to the optional property protection available under the copyright laws.

The Fifth Amendment, as construed by this Court, gives to a person the right to refuse to speak; the

First Amendment gives him the right to freely express his thoughts, opinions, and beliefs; the copyright law gives him the privilege—at his option—of reducing his expressions to property. Therefore, with respect to thoughts, opinions or beliefs, a person may keep them to himself by remaining silent; he may express them to the world by exercising his right of Free Speech; or he may create a vested property right by availing himself of the copyright law.

If a person avails himself of the privilege of copyrighting his expressions, then "Free Speech" is not and cannot be involved. Instead of exercising his right of Free Speech he has created property.

"Free Speech" is a personal right, it cannot be bartered away. In fact, there would be no purpose in attempting to do so, as the person who purports to acquire such right from another would have no greater right than that which he already possessed—his own right of "Free Speech." And, as a corollary, if that which is copyrighted is still subject to "Free Speech," then a copyright is a nullity, as the constitutional right of Free Speech would give to all the right to repeat and use, to publish and disseminate, the thoughts and expressions which had been copyrighted. But because a copyright changes the nature of what is expressed from that of "Free Speech" to property, it can be bartered away, it can restrict the right of others to publish and disseminate the copyrighted material.

In the instant case, that which had been written was copyrighted and the publisher now holds the copyright. The writing had therefore been changed from "Free Speech" to property. No one except by permission of the copyright owner may publish and disseminate such

book. The defendant bookseller had no right to disseminate *Tropic of Cancer*, except as permitted by the copyright owner, as the sole right to do so is a property right owned by the publisher. The author himself had no right to publish or disseminate *Tropic of Cancer;* he has assigned the right to the publisher. Only the publisher had a right to publish and disseminate that book!

Further, the owner of the copyright need not make available to the public what has been copyrighted. As this Court stated:

> "The owner of a copyright, if he pleases, may refrain from vending and licensing, and content himself with simply exercising the right to exclude others from using his property." (*Fox Film Corp. v. Doyal*, 286 U. S. 123.)

Is this then the exercise of "Free Speech"? Does "Free Speech" end with the first expression of a thought, opinion, or belief? This alone should demonstrate that "Free Speech" cannot properly be an issue where copyrighted material is involved.

As this Court further stated:

> "A copyright is the property of the individual owner, because it is a right exercised by the owner during a definite term of years exclusively for his own profit and forms the basis for extensive and profitable enterprises." (*Fox Films v. Doyal, supra.*)

Is this the right which so transcends all others in importance that rather than restrict it we would pollute the streams of commerce and poison the minds of the susceptible?

Another distinction between a copyrighted work and "Free Speech" is that by a copyright notice is given to the public that the owner of the copyright "has not abandoned his work or dedicated it to the public." Yet the very purpose of the right of "Free Speech" is to enable a person to give to the public—to share with the world—his thoughts, his opinions, his beliefs.

Still another difference is that the historic and traditional concept of "Free Speech," and the necessity for granting the right of "Free Speech," is to enable a person to express an unpopular thought, opinion or belief. A constitutional guaranty of Free Speech is not necessary to enable a person to express that which is popular! Yet a copyright is to protect the profits that can be made from a work that is popular.

The necessity for the right of "Free Speech" becomes increasingly greater as the thought, opinion, or belief becomes less popular; conversely, the value of a copyright increases with the popularity of the work copyrighted.

The constitutional protection of "Free Speech" is to assure the right to freely express thoughts, opinions and beliefs; it is not for the purpose of assuring profitable exploitation of what has been expressed. Conversely, a copyright is not for the purpose of expressing thoughts, opinions, or beliefs; it is for the purpose of changing to property what has been expressed so that it may be commercially exploited, and, if desired, to suppress its publication and dissemination. (*Fox Films Corp. v. Doyal, supra.*)

The election is at the option of the author. He may exercise the right of Free Speech, or he may obtain a

property right. He cannot avail himself of both rights. The two "rights" are in absolute contradiction; there exists an inescapable logical incompatibility."

None of the occasions for which the right of "Free Speech" was intended will in any way be adversely affected by properly construing copyrighted material as not included within the realm of Free Speech. Would the recognition of this distinction prevent or interfere with:

(a) Efforts to organize unions or political parties? (*Herndon v. Lowery*, 301 U. S. 242.)

(b) The distribution of handbills? (*Hague v. C. I. O.*, 307 U. S. 496; *Schneider v. Irvington*, 308 U. S. 147.)

(c) The right to picket or carry a banner? (*Carlson v. California*, 310 U. S. 106.)

(d) Making speeches or writing articles attacking or defending existing beliefs or office holders, or advocating political, social, religious or economic ideas, beliefs, changes or reforms? (*Murdock v. Pennsylvania*, 319 U. S. 105; *Taylor v. Mississippi*, 319 U. S. 583.)

Neither would the owner of a copyright be unprotected. He would have the full protection of the Fourteenth Amendment: he could not be deprived of such property, including the right to reasonably use his property gainfully, such as by sales of copies of the copyrighted works, except by due process. Therefore, unless reasonably required in the public interest, the right to sell copies of the copyrighted works is fully protected. But the State could stop the sale of obscene matter. And the real problem confronting society is

not the use of obscene expressions by the individual, but the commercial exploitation of pornographic material.

The amici curiae brief filed in this case on behalf of "more than one hundred authors, editors and publishers" contains the following statements:

> "* * * We submit it is an urgent duty of this Court now * * * to announce, once and for all the nation, the right of the people to read this and any other work of literary, artistic or other import." (P. 6.)
>
> "Literature and art, no less than motion pictures, are paramount means for the circulation of ideas and for the carrying-out of this nation's deepest dialogue. Only by affording the widest possible public access to them will the historic function of freedom of expression be fulfilled." (Pp. 10-11.)
>
> "These (national standards) ought embrace nothing less than the right of every adult person, whatever the State in which he may reside, to read the literature and view the art of his choice * * *" (P. 12.)

Obviously, "the right of the people to read" is totally inconsistent with a copyright owner "exercising the right to exclude others from using his property." (*Fox Films v. Doyal, supra.*) Likewise, this right of the copyright owner is totally inconsistent with "affording the widest possible public access" to books and other forms of expression.

The very purpose of securing a copyright is to prevent free distribution and access to the copyrighted

material. It may be suppressed entirely. Even if the copyright owner does commercially exploit the material, it is self-evident that the increase in cost to the public, because of the royalty customarily associated with copyrighted material, is in and of itself an inhibiting factor during the life of the copyright.

An exclusive monopoly on the right to "print, reprint, publish, copy, and vend the copyrighted works" is hardly Freedom of Speech and Press.

If material is copyrighted, it is within the sole discretion and tender mercies of the copyright owner as to whether or not any person, adult or otherwise, shall be permitted to read the material; the copyright owner, at his slightest whim, may completely suppress the material, or may permit those who reside in one state to read it, but deny the right to those who reside in other states.

Surely we can not deny to a state the power to exclude obscene material on the basis that to do so is an unconstitutional infringement on the right of Free Speech and Press, yet grant to a copyright holder the right to exclude his copyrighted material, regardless of its nature, on the basis that he has a property right which may not be infringed upon, a property right which transcends the constitutional guarantee of Free Speech and Press.

From their brief it is clear that counsel for "more than one hundred authors, editors and publishers" have unequivocally taken the position that no law should operate to prevent the free and unrestricted distribution of so-called literary works; that every adult in every state should have the opportunity to read the literature

of his choice. This necessarily implies that in their opinion the copyright law is invalid.

It is only logical to assume that counsel for such authors, editors and publishers discussed with their clients the legal implications of the position taken by them. It would be unreasonable to even suggest that such counsel would attempt to destroy all laws impinging upon the right of free speech and press, which in their view must likewise include the copyright law heretofore so extensively used by their clients, without first ascertaining that their clients were desirous of losing the copyright law in order to gain unbridled Free Speech and Press.

Consequently, it is especially appropriate that this court should face the issue here presented, and determine whether or not the copyright law unconstitutionally interferes with Free Speech and Press, or if copyrighted material is removed from the realm of Free Speech and Press when the author exercises his option to convert such material into property.

While it must necessarily follow that the copyright law is invalid if it purports to cover material subject to the constitutional guarantee of Free Speech and Press, we again emphasize that it is our contention that the copyright law does not and was not intended to cover material to which the constitutional guarantee of Freedom of Speech and Press extended. When the author avails himself of his right to copyright his works, he has made such works property; he has removed it from the public domain. Yet it is only to expressions within the public domain that Freedom of Speech and Press apply. The right granted by the

constitutional guarantee of Free Speech and Press is too broad to apply to anything not in the public domain. Stated conversely and more precisely, everything to which the constitutional guarantee of Free Speech and Press is applicable must, by the very nature of this guarantee, be in the public domain.

The constitutional guarantee of Free Speech and Press extends to all, and the right of "publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms." So *all* (not merely the copyright owner) may publish and disseminate *any* material within the scope of such constitutionally protected freedoms.

No one may validly claim *both* the constitutional guarantee of Free Speech and Press, and also the exclusive right to do what such constitutional guarantee grants to all.

Counsel for "more than one hundred authors, editors and publishers" profess the deep concern of their clients lest even one person be denied the opportunity to read even one book due to the voice of the community's conscience, acting through government, prohibiting the sale of obscene matter. They complain that the standards established by this Court, by which to judge obscenity, and to regulate the exercise of government actions, are too vague, uncertain and indefinite. But how real is this concern?

These same publishers, acting through their censors, (euphemistically called editors) each day effectively supress more written material than has been suppressed or attempted to be suppressed by government action

in this country since the adoption of the Constitution! Under the decisions of this Court, destructive censorship by government is impossible. All that can be suppressed by government is that which is obscene, as determined by standards established by this Court.

But consider the very real and effective censorship wielded by those who so vehemently oppose any government action.

Their censors, with no standards other than their unrestricted personal opinions, censor all material submitted to their publishers. And if these censors, however arbitrarily, reach the conclusion that the material would not have popular appeal—would not be profitable to publish—they effectively censor it by rejection. Are they then so concerned for fear that their actions will deny even one person the right to read that material?

Yet Freedom of Speech and Press is most needed to protect that which is unpopular. Surely this is a clear violation of the purpose, spirit and intent of these constitutional guarantees.

On the other hand, if these censors determine that the material submitted would have great public appeal, would be profitable to publish, that the public would avidly desire to read it, they promptly copyright it so that none may read it without paying tribute to these censors and their masters.

Is it the true function of the great constitutional guarantee of Free Speech and Press to protect this system or is this system a complete perversion of what was intended?

Shall the clients of counsel who filed this amici curiae brief continue to have almost absolute and un-

limited control over what may be censored and suppressed, and what may be published and distributed? Shall the still, small voice of conscience, as expressed by government action in prohibiting obscenity, be forever silenced so that only the publishers may decide what may be read—and what may not be read—by the American public?

If this court holds that copyrighted material is within the realm of constitutionally protected Free Speech and Press, if these publishers are to wield this great power of censorship and suppression, then this court should guide and control the exercise of such power by establishing standards equally definitive to those applicable to government action.

We contend that Freedom of Speech and Press and the copyright law can co-exist. Each has its function to perform. But the functions are different. And they apply in different areas of our system of government. Freedom of Speech and Press is a human right, equally available to all, predicated on the theory that all should have the right to freely express their opinions, ideas and beliefs without fear of reprisal. The copyright law grants a discriminatory property right to the gifted few who are capable of writing material which can be successfully exploited commercially, predicated on the theory that, but for this economic reward, this special privilege, these gifted few would not use their God-given gifts.

It is unconscionable to even suggest that on the one hand the law grants by copyright to these gifted few a property right which as to the copyrighted material effectively denies the right of Free Speech to the com-

mon man, and on the other hand protects with the cloak of Free Speech the material which is the subject of the copyright granted to the gifted few.

Is it consistent with our philosophy of government for a gifted few authors to have both Free Speech and exclusive property rights in copyrighted material, and the common man to have neither a property right nor the right of Free Speech as to such copyright material?

Let the gifted few authors have the exclusive property rights granted by a copyright, but do not further cloak such property rights with Free Speech. Do not deny the main attributes of Free Speech—the right "to print, reprint, publish, copy, and vend"—to all but a gifted few authors, and then also give these gifted few the exclusive right of Free Speech as to such copyrighted material.

II.

The Constitutional Guarantee of Freedom of Speech and the Press Does Not Protect Obscene Matter.

This Court, in *Roth v. United States* and *Alberts v. California*, 354 U. S. 476 (hereinafter referred to as *Roth-Alberts*), held, that obscenity is not within the constitutionally protected speech or press, stating:

> ". . . There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene . . . *It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight*

> *social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."*

The emphasis was added by this Court, so important was such principle.

This Court further stated in *Roth-Alberts,* at page 484:

> "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all the 48 states and the 20 obscenity laws enacted by the Congress from 1842 to 1956."

Now it is urged that all of this be abandoned in favor of some theory that freedom of speech and the press in the field of obscenity and pornography should be virtually absolute.

Petitioner in his brief (p. 52) urges reliance solely on laws dealing with sexual *misconduct,* without invading what he terms the area of protected expression, even if crudely and obscenely describing and urging such illegal acts.

The American Library Association in its amicus curiae brief in support of petitioner (p. 28) urges that the persuasion of public opinion should be the only ac-

ceptable censor except where society or one of its members is wrongfully *damaged*.

The more than one hundred authors, editors and publishers in their amici curiae brief (p. 16) take the view that the "Roth-Manuel Enterprises" rules for the testing of expression should be qualified so as to remove all threat to any material not worthless, and permit no finding of worthlessness where there are persons to assert its worth.

To require that a prosecution for the publication of obscenity depend upon a showing that the material actually results in damage to someone imposes an impossible burden. Even if such damage could be proved, it is like granting immunity to shooting in the streets unless some person is actually hit. And to assert that worthlessness does not exist where there are persons to assert worth, is granting license to a publisher of obscenity who has friends.

The end result of any such abandonment of the rules expressed in *Roth-Alberts* is the declaration of an absolute constitutional freedom to express and publish the obscene. Nor could such absolute freedom of expression be logically confined merely to the obscene. If curtailment of obscenity be abandoned, so must curtailment of the other aspects of expression.

Such absolute freedom would create chaos under a Constitution certainly never designed for that purpose.

It has been said that our Constitution had within itself the seeds of its own destruction. Such statement

can be readily proven correct by construction of it in such a manner as to create chaos. Under the "absolute" freedom theory a person in the exercise of free speech might say anything, anywhere, at any time, and enjoy immunity from laws against libel, slander and perjury made impotent by this absolutism.

Furthermore, no executive or judicial rule or regulation restricting free speech could stand if laws enacted with the dignity of legislation cannot reasonably restrict expression. Court rules specifying time limits for arguments, or prohibiting spectators from talking in the courtroom, or getting up and arguing a case, become invalidated. The very absurdity of the result demonstrates the fallacy of the absolute freedom theory.

The rules of *Roth-Alberts* are the culmination of many years of judicial experience in reaching a balance between the individual's constitutional right of freedom of expression and the sovereign's maintenance of the social interest in order and morality.

As stated in *Roth-Alberts*, the protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

Obscenity is certainly not required to further this ideal, and there appears no valid reason to abandon the doctrine that obscenity is not within the area of constitutionally protected speech, or to revise the definition of obscenity in a manner that guarantees the same result.

III.

California Has Enacted Obscenity Statutes Meeting the Constitutional Requirements Expressed by This Court.

This Court, in *Roth-Alberts*, presented the following definition of obscenity:

> "Whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."

And further, in footnote 20, page 487:

> "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code, Sec. 207.10(2) (Tent. Draft No. 6, 1957), viz.:
>
> '. . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters . . .' "

In 1961 California amended its obscenity statute (Penal Code Sec. 311.2) to provide:

> "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute, or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor." (Stats. 1961, c. 2147, p. 4428, sec. 5.)

Section 311(a) of the Penal Code defines "obscene" to mean:

> "'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or escretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." (Stats. 1961, c. 2147, p. 4427, sec. 5.)

The phrase "utterly without redeeming social importance" appears to be taken from *Roth-Alberts,* at page 484.

It is clear that California, in enacting these statutes, has so closely followed the *Roth-Alberts* case that in effect this Court has written them.

Petitioner urges that to define obscenity in terms of its appeal to the "average person, applying contemporary community standards" will result in such "average person's" rejection of that of no social importance to him, with the resulting suppression of such material. Petitioner quotes Lockhard and McClure (*Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. Law Review, 5):

> "The application of such standards would reduce art and literature to levels acceptable to the masses and deprive particular primary audiences of material that is of social importance to them."

Such argument however, strains at the meaning of the word "average" as used in the definition. The word as used certainly was not meant to exclude any

imaginary top or bottom percentage of persons based on their education, income, social standing or reading habits. It was obviously used to forestall the possibility that suspect material be judged by extremists; the ultra-prudish on one hand and degenerates on the other.

In instructing the jury on the California law of obscenity, the trial judge did not limit the application of contemporary standards to the Los Angeles community, but in fact couched the instruction in the general terms of Section 311(a) and the *Roth-Alberts* cases: "Applying contemporary standards . . . which go substantially beyond customary limits of candor in description or representation of such matters. . . ." [Plaintiff's two-page instruction on Penal Code Section 311, subdivision (a), citing *Roth v. United States* and *In re Harris*, and R. T. Vol. XII, p. 1174, lines 13-19.]

While there may have been academic discussions at the bench as to the term "community" as used by this Court, it is most significant that the term is not even used in the California definition of obscenity. In the course of the trial there may have been instances where counsel, in interrogation of witnesses, referred to the Los Angeles area in this regard. However, the overall conduct of the trial could hardly be said to have affected the meaning of the law of California or the specific instruction on the point given by the trial judge.

Furthermore, in the course of the trial, petitioner did not indicate a belief that the contemporary community standards of Los Angeles were more strict than those of any other community nor did he offer proof. In fact, he would have been hard put to so prove, in that Los Angeles is a city whose reputation for liberal-

ity and sophistication in sexual attitude prompted the following from *A Report on Obscene Matter sent through the mail to the House Committee on Post Office and Civil Service by the Subcommittee on Postal Operations,* 86th Cong., 1st Sess. (1959). (Quoted in Lockhard and McClure, *supra*, p. 36, footnote 174):

> "Difficulties in prosecuting violators resulting from liberal attitudes of courts and juries—particularly in certain metropolitan areas, notably Los Angeles and New York—have established virtual sanctuaries allowing dealers in publications devoted exclusively to distorted sex to operate in defiance of the Post Office Department's best efforts to bar their use of the mail or bring them to justice."

There is nothing in the instructions of the court or in the conduct of the trial indicating that the jury, in determining the guilt of petitioner, used the standards of any particular community other than the community comprising the entire United States.

IV.

The Book Tropic of Cancer by Henry Miller Is Obscene Within the Meaning of the California Statutes.

As the California legislature in enacting the laws under which petitioner was prosecuted followed the rules laid down by this Court, so did the trial court in the conduct of this case. The requirement of scienter was met. Also, the testimony of expert witnesses was offered by both sides. The admission of such testimony followed the rule expressed by the Supreme Court of California in *In re Harris* (1961), 56 Cal. 2d 879,

366 P. 2d 305, that the exclusion of expert testimony in an obscenity case was a violation of due process of law. Such holding of course follows the lead of Mr. Justice Frankfurter concurring in *Eleazar Smith v. California, supra.*

In the trial of the case expert witnesses were utilized to the fullest extent. Respondent produced eighteen experts and petitioner nearly that many. Their testimony occupied the major part of the twenty-seven trial days. Certainly each side was offered every opportunity to present its case to the jury.

When Mr. Justice Frankfurter, concurring in *Eleazar Smith v. California,* indicated he believed the testimony of expert witnesses to be so important that he would make the right to introduce such evidence a requirement of due process in obscenity cases, and the Supreme Court of California followed his reasoning in *In re Harris, supra,* these justices manifestly must have believed that such evidence was thus entitled to *great weight,* by the jury and the trial judge, and on appeal. It must follow that the testimony of the eighteen expert witnesses produced by the People of the State of California at the trial of this action is entitled now to the most careful attention in this Court. Assuredly the opinions of such experts who saw fit to take the witness stand, be sworn, and be subjected to cross-examination, are entitled to more consideration than the views of critics expressed as a part of earning a livelihood.

Exerpts from the testimony of plaintiff's eighteen expert witnesses are attached as Appendix B.

The Supreme Court of California in *Zeitlin v. Arnebergh,* 59 A. C. 930, relying heavily on the Court of

Appeals of New York in *People v. Richmond County News, Inc.*, 9 N. Y. 2d 578, construed the California obscenity laws as prohibiting only "hard core" pornography and held that *Tropic of Cancer* did not reach that plateau. However, in voicing the "hard core" rule, such court erroneously determined that the opinions of this Court necessitated its adoption.

The opinion of Mr. Justice Harlan in *Roth-Alberts*, relied upon by the California court as authority for the adoption of the hard-core pornography concept, is but an exrpession of his individual ideas in concurrence and dissent. It was not the view of the majority of the court.

When it came Mr. Justice Harlan's turn to announce the judgment in *Manual Enterprises v. Day* (1962), 370 U. S. 478, he stated (at 370 U. S. 489):

> "At least one important state court and some authoritative commentators have considered Roth and subsequent cases to indicate that only 'hard-core' pornography can constitutionally be reached under this or similar state obscenity statutes. See *People v. Richmond County News, Inc.*, 9 N. Y. 2d 578, 216 N.Y.S. 2d 369, 175 N.E. 2d 681; Lockhart & McClure, supra, at 58-60. Whether 'hard-core' pornography, or something less, be the proper test, we need go no further in the present case than to hold that the magazines in question, taken as a whole, cannot, under any permissible constitutional standard, be deemed to go beyond the pale of contemporary notions of rudimentary decency."

Certainly such is not a declaration that the First Amendment protects all suspect material other than hard-core pornography.

It must be emphasized that Mr. Justice Harlan, concurring in *Alberts* but dissenting in *Roth*, wanted to limit federal obscenity censorship strictly to hard-core pornography but to grant the state somewhat broader censorship powers, the limits of which he did not spell out. (Lockhard & McClure, in *Censorship of Obscenity*, 45 Minnesota Law Review 5, at p. 28.)

It is respondent's intention to petition this Court for a writ of certiorari in *Zeitlin v. Arnebergh, supra*, and the notice of such intention has been filed.

It is most significant that shortly after *Zeitlin v. Arnebergh*, the New York Court of Appeals (the very court relied upon by the California Supreme Court), declared *Tropic of Cancer* to be "hard core" pornography. (*People v. Fritch*, ... N.Y. 2d ...., ... N.E. 2d .....)

Respondent's position as to the obscenity of the book in question can be no better presented than to quote the New York Court of Appeals in such case:

> "In order to render more meaningful our duty to make an independent constitutional appraisal we feel compelled, though loath to do so, to refer to certain words and passages contained in the book, with all due respect for the dignity of this court and the judicial system. We do so to bring to the attention of the bar the factual basis for our conclusion that the book is obscene, as well as to demonstrate that this conclusion is not predicated upon any preconceived notions or predilections on our part.
>
> "Throughout its pages '4 and 5 letter' vile and filthy words and derivatives thereof, by conserva-

tive estimate, are used more than 300 times. We are mindful that the use of these words, standing alone, may not necessarily render the book obscene by legal standards. We therefore are constrained to set forth some excerpts which typify the manner in which this language is used throughout the book.

"On page 5* of the book the central character describes his desires for Sylvester's wife, Tania:

" 'Where now is that warm cunt of yours, those fat, heavy garters, those soft, bulging thighs? There is a bone in my prick six inches long. I will ream out every wrinkle in your cunt, Tania, big with seed. I will send you home to Sylvester with an ache in your belly and your womb turned inside out. Your Sylvester. Yes, he knows how to build a fire, but I know how to inflame a cunt. I shoot hot bolts into you, Tania, I make your ovaries incandescent. Your Sylvester is a little jealous now? He feels something, does he? He feels the remmants of my big prick. I have set the shores a little wider, I have ironed out the wrinkles. After me you can take on stallions, bulls, rams, drakes, St. Bernards. You can stuff toads, bats, lizards up your rectum. You can shit arpeggios if you like, or string a zither across your navel. I am fucking you, Tania, so that you'll stay fucked. And if you are afraid of being fucked publicly I will fuck you privately. I will tear off a few hairs from your cunt and paste them on Boris' chin. I will bite into your clitoris and spit out two franc pieces. . . .'

*Page references are to pages in the hardback edition.

"Describing another sexual episode, at page 18 of the book the central character says:

" 'In the lavatory I stand before the bowl with a tremendous erection; it seems light and heavy at the sametime, like a piece of lead with wings on it. And while I'm standing there like that two cunts sail in—Americans. I greet them cordially, prick in hand. They give me a wink and pass on. In the vestibule, as I'm buttoning my fly, I notice one of them waiting for her friend to come out of the can. The music is still playing and maybe Mona'll be coming to fetch me, or Borowski with his gold-knobbed cane, but I'm in her arms now and she has hold of me and I don't care who comes or what happens. We wriggle into the cabinet and there I stand her up, slap up against the wall, and I try to get it into her but it won't work either. No matter how we try it it won't work. And all the while she's got hold of my prick, she's clutching it like a lifesaver, but it's no use, we're too hot, too eager. The music is still playing and so we waltz out of the cabinet into the vestibule again and as we're dancing there in the shithouse I come all over her beautiful gown and she's sore as hell about it.'

"Discussing his experience with a prostitute on a street corner in Paris, he states (p. 42):

" '* * * there was always a cluster of vultures who croaked and flapped their dirty wings, who reached out with sharp talons and plucked you into a doorway. Jolly, rapacious devils who didn't even give you the time to button your pants when it was over. Led you into a little room off the

street, a room without a window usually, and, sitting on the edge of the bed with skirts tucked up gave you a quick inspection, spat on your c....k, and placed it for you.'

"As can be plainly seen, the book is a compilation of a series of sordid narrations dealing with sex in a manner designed to appeal to the prurient interest. It is devoid of theme or ideas. Throughout its pages can be found a constant repetition of patently offensive words used solely to convey debasing portrayals of natural and unnatural sexual experiences. It is a blow to sense, not merely sensibility. It is, in short 'hard core pornography', dirt for dirt's sake (*United States v. 'Ulysses,'* 5 F. Supp. 182), and dirt for money's sake (*Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684, 692). We see no reason for adopting an unrealistic appraisal of the nature of this book when there is such overwhelming proof of its incompatibility with the current moral standards of our community. If, as the County Court held, this book is not obscene as a matter of law, it is difficult to conceive when, if ever, a book can be held to be obscene under any established legal standard."

V.

A State Court Jury's Determination of Obscenity When Based Upon a Valid Statute and Definition of the Term Must Not Be Disregarded.

This Court is here presented with the ultimate question of the stability of a state jury's verdict of obscenity fortified by the testimony of eighteen expert witnesses who, by their stature, are entitled to receive the utmost consideration and respect.

While it may not be clear as to whether an independent judicial review by an appellate tribunal of the material in question is *required*, of course such review may be practiced. (See Lockhart and McClure, *supra*, p. 114.) However, for appellate courts to carry this independent review to the extreme of remaining oblivious to the verdict of juries is to relegate trial by jury in obscenity cases to mere frivolity.

As expressed by Judge Learned Hand in *United States v. Levine* (1936), 83 F. 2d 156:

> "As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. We impose such a duty upon a jury (Rosen v. U.S., supra, 161 U.S. 29, 42, 16 S. Ct. 434, 480, 40 L. Ed. 606), because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of a community. There can never be constitutive principles for such judgments, or indeed more than cautions to avoid the personal abberations of the jurors. We mentioned some of these in U.S. v. One Book Entitled Ulysses, supra, 72 F. 2d 705; the work must be taken as a whole, its merits weighed against its defects (Konda v. U.S. (C.C.A. 7), 166 F. 9); if it is old, its accepted place in the arts must be regarded; if new, the opinions of competent critics in published reviews or the like may be considered; what counts is its effect, not upon any particular class, but upon all those whom it is likely to reach. Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusions of a

llogism of which they are to find only the minor emise, but really a small bit of legislation ad , like the standard of care."

Recognizing that in many obscenity cases the appellate courts have before them merely the suspect material itself, and are really in the same position to judge it as the jury, in the instant case there were expert witnesses expressing opinions. Thus, the credibility and the weight to be given to the testimony of these witnesses testifying for each side, had to be determined by the jury. And such determination of credibility, knowledge and sincerity of witnesses, and the weight to be given to their testimony, so basicly within the sole province of the jury, and expressed in the verdict, must not be rightly regarded.

In exercising its independent judgment of the material now in question, this Court should remain ever mindful that a jury worked at the problem for twenty-seven trial days. Its verdict is entitled to due respect.

Conclusion.

The judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles should be affirmed.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney of the City of Los Angeles,

PHILIP E. GREY,
Assistant City Attorney,

WM. E. DORAN,
Deputy City Attorney,

Attorneys for Respondent.

APPENDIX A.

Memorandum Opinion and Judgment.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Bradley Reed Smith, Defendant and Appellant. Superior Court No. CR A 5113, Trial Court No. 151588.

Appeal by defendant from judgment and order granting probation, of the Municipal Court of the Los Angeles Judicial District, Kenneth L. Holaday, Judge. Appeal from judgment dismissed; order granting probation affirmed.

For Appellant—Brock and Fleishman by Stanley Fleishman.

Amicus Curiae in Support of Appellant—A. L. Wirin, Fred Okrand and Nathan L. Schoichet.

For Respondent—Roger Arnebergh, City Attorney, Philip E. Grey, Assistant City Attorney, Edward P. George, Deputy City Attorney.

Appellant was found guilty by a jury in the Municipal Court of the Los Angeles Judicial District of violation of P.C. § 311.2, by reason of his exhibiting and distributing of obscene matter, the book, "Tropic of Cancer," and probation was granted by that court.

Appellant argues here that the book "cannot constitutionally be held obscene" under the code "in the light of the guarantees" of the United States and California Constitutions, and that the jury verdict never answers

the question of constitutionality, or whether the book was "utterly without redeeming social importance" within the definition of P.C. § 311 (a). Of course, the jury makes no specific finding of constitutionality, but the trial court had instructed the jury in the language of the code and the meaning of obscenity as determined by the California and United States Supreme Courts, in which we find no error. It is presumed, in the absence of any showing to the contrary, that the jury followed the law as to which it was instructed. Thus the jury impliedly found that the book was "utterly without redeeming social importance", a finding amply supported by respondent's expert witnesses. With this finding we must agree, since as we stated in *People v. Harris* (1961) 192 Cal.App.2d Supp. 887, 894: "We hold that, if the contents of the book could not support an implied finding that it is obscene, the question is for the court, but if it could support such a finding, the question is for the jury as in any other case where there is an issue of fact." In *Roth v. United States* (1957) 354 U.S. 476, 490, 1 L.ed. 2d 1498, 1510, as we pointed out in *People v. Harris, supra,* p. 894, the Supreme Court approved an instruction informing the jurors that they were "the exclusive judges of what the common conscience of the community is . . . ."

The recent case, *People v. Williamson* (1962) 207 A.C.A. 885, 888, held that ". . . whether a particular book is obscene is primarily one of fact," relying on *Roth-Alberts* which approved the definition of obscenity stated in *People v. Wepplo* (1947) 78 Cal.App.2d Supp. 959, 961. The Supreme Court of California in *In re Harris* (1961) 56 Cal.2d 879, 880, stated: "The

standard for judging obscenity adequate to withstand the charge of constitutional infirmity is whether *to the average person* [emphasis ours], applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. [Citations.]" *People v. Williamson, supra,* quotes that standard verbatim, then upholds the giving of an instruction employing the almost exact wording of the definition of obscenity contained in P.C. § 311 (a). We believe that juries are composed of average persons.

Appellant argues that the Legislature made as an integral part of the definition of obscenity, that the matter be utterly without redeeming social importance (appellant at p.12 opening brief uses the word "value," which is not the same as the word "importance" employed by the Legislature), and thus has made it the obligation of every judge and appellate court before whom the constitutional issue is raised, to make an independent review of the matter to determine whether the matter can be found "constitutionally" to be obscene. He cites numerous United States Supreme Court decisions to "the requirement of independent judgment." A review of those cited shows: *Times Film Corp. v. City of Chicago* (1957) 355 U.S. 35, 2 L.ed.2d 72; *Sunshine Book Co. v. Summerfield* (1958) 355 U.S. 372, 2 L.ed.2d 352; *One, Inc. v. Oleson* (1958) 355 U.S. 371, 2 L.ed.2d 352 (all per curiam opinions merely citing the *Roth* case); *Kingsley Corp. v. Regents of Univ. of N.Y.* (1959) 360 U.S. 684, 3 L.ed.2d 1512, (concurring opinion of Justice Harlan, concurred in by Justices Frankfurter and Whittaker at 3 L.ed.2d 1524, wherein those Justices were referring, at p. 1526, not to a trial court's finding but

to three of seven New York State Justices' opinion, 151 N.E.2d at 200, and to the scope of the applicable New York law, and stated: "The opinion . . . , as . . . with §§ 122 and 122-a themselves when independently read in their entirety, . . ." and at p. 1527 of 3 L.ed.2d, Justice Harlan said: ". . . I have viewed this film"); *Manual Enterprises, Inc. v. Day* .....U.S. ....., 8 L.ed.2d 639, in which the justices could not agree on an opinion, concerning a ruling by the Postmaster's Department, barring certain magazines from the U.S. mails, under a Federal statute; Justices Harlan and Stewart made an independent review of the proscribed magazines (id. p. 648); it does not clearly appear that the other Justices did so. Those cases do not support the thesis that independent judicial judgment on review is *required*, although, of course, it may be practiced. The other cases cited by appellant from federal courts inferior to the Supreme Court or from the courts of other states are at most merely persuasive and not binding on our court.

Moreover, the book here in question has been read by this court, unlike the U.S. Supreme Court, except for Justice Harlan, in the *Roth* case, (1957) 354 U.S. 476, 1 L.ed.2d 1498, 1509, 1514. From this reading, we regard the book, as a whole, as an autobiographical abortive attempt at literature by an American self-expatriate in Paris, separated from his wife who sends him money at times, from whom he is mentally, spiritually and physically divorced, indulging in adulterous

relationships with Paris street women and others, whom he frankly and appropriately terms "whores", as well as other barrack-room four-letter words; his chief obsession, interest and necessity (waking or sleeping, drunk or sober) is food, drink and sexual acts or conversation about the same; the slimy flow of his attraction to excrement expressed in a four-letter word and thoughts thereof runs like a sewer through his printed work; the putrid paragraphs and pages of pornography pervade the book. Though some pages present the author's thoughts and ideas, at times cleverly written, describing his self-incrimination as a moral derelict and social dissenter, belonging "not to men and governments"; but even these pages are often intersticed with the putrescence and slime of his mental sewer, his lewdness and lascivity with which he is constantly preoccupied. The entire book is obscene, to the average person, applying contemporary standards, and is predominantly an appeal "to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance", as defined in P.C. § 311 (a). Eighteen expert witnesses of stature thought so and so testified; the jury thought and found so; so do we. We hold, as did the jury, that the book is obscene and utterly without redeeming social importance. Although *Roth v. United States* (*Alberts v. California*) 354 U.S. 476, 1 L.ed.2d 1498, states that "ideas having even the

slightest redeeming social importance . . . have the full protection of the guaranties . . .", we must consider the language of the court, immediately following the above: "unless excludable because they encroach upon the limited area of more important interests." (p. 484 U.S., 1507 L.ed.2d) We hold, not only, that the book has not the slightest tendency to show some social importance, but also that it lacks anything in the slightest *redeeming*. In our opinion the protective interest of the state in the morality of its citizens, would be encroached upon should we hold otherwise. Further, were we to substitute our independent judgment in favor of the free speech and press guarantee, which we do not, it would be to fly in the face of the California Constitution, Art. 1, section 7, reading: 'The right of trial by jury shall be *secured to all*, and remain inviolate. . . ." (Emphasis ours.)

"Under the constitution of this state the same right is guaranteed to the people as to the defendant to have a jury ultimately pass upon *the fact* of guilt or innocence." (Emphasis ours.) *People v. Stoll* (1904) 143 Cal. 689, 696. "In a criminal action the sovereign has the same right to have the truth of its accusation against the defendant determined by a *trial court* to the same extent and in the same degree as has the accused. (*People v. Stoll*, 143 Cal. 689, 696 . . .)" (Emphasis ours.) *People v. Wisecarver* (1944) 67 Cal.App.2d 203, 209, quoted in *People v. Misner* (1955) 134 Cal.App.2d 377, 380-1. See also 29 Cal. Jur.2d pp. 475-482; 497-500.

We are of the opinion that where substantial evidence supports the implied findings of the jury, an appellate court, not only is not required to, but should not in effect set aside the factual determination by a jury that the book was obscene and that the appellant violated our penal provisions making obscenity a misdemeanor. To do so would encroach upon and destroy the People's right of trial by jury, secured to them by our Constitution, which thereby should "remain inviolate". That right would nullify the finding by the jury that the book in fact was obscene, viewed by them as to every explicit facet of the code definition, contained in one complete sentence.

We believe that the jury's finding of obscenity should be accorded at least as great, if not more constitutional weight, than that of a writer's right to imprint or disseminate through a bookstore, his depraved and degrading filthy words and obscene utterances and lewd depictions of salacious episodes of sexual scenes and mental images or than that of a bookstore proprietor to exhibit and distribute such demoralizing obscene writings. This issue is not the right of any person to read such writings, but the right of appellant to sell, exhibit or distribute them when they have been found obscene, in violation of a constitutional state statute, by a jury whose finding is supported by very substantial evidence, under instructions informing them of the legal standard of obscenity as interpreted by the highest court of our land.

The appeal from the judgment is dismissed, there being no judgment. The order granting probation is affirmed.

Dated Oct. 24, 1962.

/s/ Huls
Judge

I concur:
Swain
Presiding Judge

I concur. The purpose of this memorandum is not to limit or qualify the main opinion but to present an additional basis for affirmance. In my opinion the judgment may be affirmed even though our own examination of the book may disclose that substantial portions of the book have much social importance. Solely to illustrate the distinction I wish to make, let us consider the example of an author who writes something which even the most hardened purveyor of pornography would concede was obscene and who publishes it within the covers of a book which also contains some well-recognized literary classic, admittedly not obscene and having great social importance. Because they are two separate unconnected writings, we are sure all would concede that the latter could not redeem the former and the "book" could be banned. I believe there is only a difference in degree between that and a situation where there is added to a legitimate literary work certain obscene passages, not for the purpose of enhancing the literary passages but for

the purpose of appealing to the non-literary audience interested only in such smut, in order to sell books to them. Of course in determining whether the criticized portions are indeed obscene, they must be considered with and as part of the entire novel, and if so considered as a whole the matter is not obscene then there is no violation of law. But if so considered they are not a legitimate part of the literary work but are added islands of smut (to use a different but more accurate four letter word than perhaps the author might have used), then such obscenities are without anything to "redeem" them and, within the meaning of the statute and cases, are "utterly without redeeming social importance." I am not saying that all such material here is unnecessary to the development of the ideas the author is trying to convey. Some portions of it may be entirely proper. I am saying that the jury was justified in finding as a matter of fact that the author went too far, and we would not be justified in holding as a matter of law that the book is not obscene.

/s/ Smith
Judge

Order Certifying Cause to District Court of Appeal.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Bradley Reed Smith, Defendant and Appellant. Superior Court No. CR A 5113. Trial Court No. 151588.

This action is hereby certified on our own motion to the District Court of Appeal. The judgment and opinion of this court was filed October 24, 1962. It affirmed an order granting probation made after defendant was found guilty of exhibiting, distributing, offering to distribute and having in his possession with intent to distribute, obscene matter, to-wit, the book "Tropic of Cancer", in violation of P.C. § 311.2. This court held that the book was obscene within the meaning of P.C. § 311 (a).

The following important questions of law should be settled:

1. Is the book "Tropic of Cancer" obscene?

2. If the book has literary merit does that alone give it redeeming social importance which takes it out of the class of being obscene?

Dated October 24, 1962.

By the Court.
Swain
Presiding Judge
/s/ Huls
Judge
/s/ Smith
Judge

APPENDIX B.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. California Penal Code, Sec. 311 provides:

"As used in this chapter:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechani-

cal, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

4. California Penal Code, Sec. 311.2 provides:

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits; distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor." (Stats. 1961, c. 2147, p. 4427, 4428.)

Title 17, Section 1 of the United States Code annotated, reads, in part:

Chapter 1—Registration of Copyrights.

Sec. 1. Exclusive rights as to copyrighted works

"(a) To print, reprint, publish, copy, and vend the copyrighted work;"

———

APPENDIX C.

Dr. Frank Baxter

[Rep. Tr. Vol. 9, pp. 350-498]

Lecturer and television personality [p. 350, lines 23-24];

Professor Emeritus of English and American Literature, University of Southern California for 31 years [p. 351, lines 1-3; 18-20]; Chairman of the English Department, U.S.C. for eight years [p. 351, lines 9-11]; Resident of Los Angeles County since 1930 [p. 350, lines 15-17].

Bachelor of Arts and Master of Arts degrees, University of Pennsylvania [p. 352, lines 16-18]; Doctor of Philosophy degree from Trinity College, Cambridge, England [p. 352, lines 19-21]; recipient of four Honory Doctorates, three in Letters and one in Fine Arts [p. 358, lines 16-17].

Author of seven articles for the Encyclopedia Britannica [p. 348, lines 24-25].

Past President of Phi Beta Kappa Chapter at U.S.C. [p. 353, lines 19-21]; served as First Chairman, U.S.C. Academic Senate [p. 353, lines 22-25].

The first recipient in the United States to receive, as an individual, the George Foster Peabody award, a national honor for excellence in television programming [p. 355, lines 9-26]; has received approximately 35 national honors for pioneering in educational television, including: The Sylvania, a citation from the National Association for Better Radio and Television, two Ohio State awards, and seven "Emmys" from the National Academy of Motion Picture Arts and Sciences, an "Emmy" being a statuette similar in nature to a

motion picture "Oscar," awarded by the television industry to those in the industry whom the members deem to be worthy of praise [p. 357, lines 2-12].

Dr. Baxter testified that *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as the term is defined by Penal Code Section 311(a) [p. 360, lines 8-19; p. 372, line 21, to p. 373, line 25].

Showing Dr. Baxter as a scholar who has not lost the community pulse, the witness succinctly states the problem of censorship and the community:

> "Like every other member of society who has any claim to civilization, I am, of course, always very much worried by the problems of censorship imposed on the opinion or will of others or of the State upon the opinion or will of the individual.
>
> "Yet we all know that in a complex society of ours we live by rules. We have to. Without standards and rules, such simple matters as driving on the right has been argued classically, I have no doubt, as an infringement of individual enterprise.
>
> "We know that we can't sell with impunity cancer cures by mail, which are fraudulent quackeries. We know you can't sell pornographic postcards in the school yard. There is a level, in short, that is the great concern and the difficulty in the twilight zone of all censorship.
>
> "We know that society has to have standards and has to have rules. Our American society, it seems to me, grants a great deal of leeway, a tremendous deal of leeway. But down here there is a level beyond which it is not socially desirable, safe, or healthy for people to be allowed to go.

"There are just things you can't do in society if society is going to hang together in our populated cities like ours. Every child has to learn rules. These things are important. Each one is, of course, philosophically an infringement of liberty, perhaps. . . ."

Dr. Baxter unmistakably asserts his position that *Tropic of Cancer* is obscene and below the level of community tolerance:

"I felt that I had to state that position, that there is a line. Now, my position, very clearly, is that this book falls below that line. Not only does it deal with matter of sex, which is quite all right —this is a very fact of life, it's a great concern of modern literature—but it does it in a way that seems to me purposely and determinedly obscene, purposely and determinedly shocking" [p. 374, line 7. to p. 375, line 25].

Dr. Baxter tells why he feels *Tropic of Cancer* is shocking:

"I think the book is shocking in a number of ways: I would hate to see a young person, young woman, young man, boy or girl meeting sex in this book; for obviously the author has a revulsion against all beauty, truth, and good, and sex to him is a frankly animal thing.

"The only four-letter word of which he finds obscene, I think, is 'love.' Any of the values which give decency and order to life are trampled on in this book.

"I feel that it would be a shock, it would be a trauma in the inner psyche of a young man or

woman, who would turn with a revulsion from the whole business of man and woman in life" [p. 376, lines 14-25].

Expounding on Miller's purpose in writing *Tropic of Cancer:*

"When a man says, 'This isn't a book. This is a libel, slander, defamation of character. This is not a book, in the ordinary sense of the word. This is a prolonged insult, a gob of spit in the face of art, a kick in the pants to God, man, destiny, time, love, beauty' [quoting from Miller's purpose, p. 2, Tropic of Cancer], and then proceeds with all the apparatus of obscenity to follow up in all these pages this anarchic declaration against all the values by which men live, arrived at slowly. I regard this book as below the line, that line of censorship, that line of tolerance" [p. 375, line 26, to p. 376, lines 1-9].

Asked whether *Tropic of Cancer* has redeeming social importance to the average person in the community because this book would lead to a healthier, more frank, less inhibited sex life for the average person [as defense witness Dr. Blake Nevius, Chairman of the English Department, U.C.L.A. testified], Dr. Baxter replied:

"No. As I have just said, really it [*Tropic of Cancer*] seems to me rather to pollute the stream rather than to clarify it. It doesn't reduce life to what I consider to be the basic essentials but rather it walks into an area where the basic essentials seem to me to be perverted and twisted.

"This is no life which I as a soldier or one who has worked in theaters or sailed as a sailor on

a British ship, or worked in hospitals, can recognize. I may be naive, but this seems to me to be a strange and shocking stepping aside out of life. And whatever it says about its particular sort of life seems to me to be almost clinical; that this would belong, perhaps, better in a medical work dealing with abnormality than with any novel addressed to the general public, that average decent person" [p. 377, lines 6-19].

Responding to testimony propounded by defense experts [Dr. Charles Kaplan, Chairman of the Department of English, Valley State College] that *Tropic of Cancer* is in the main stream of American literature in the same tradition as Thoreau, Whitman, Emerson and Mark Twain's *Huck Finn:*

"I think that Emerson's horror, could he in another world hear that question, would be cosmic. Thoreau was a petty rebel against many things and an important rebel against many others. But neither Emerson nor Thoreau nor Walt Whitman, who, say what you will, is a very healthy man who said, 'It is good to be alive.' It is good to be a man,' would accept this as the heritage of the tradition that they established.

"As for Mark Twain, he might have read this but for the wrong reasons, I'm sure. He was a very earthy man and in all Mark Twain you can't find ten lines that will compare to ten pages, let us say, that will compare to any five lines that I can come on almost at random here in the appeal as prurient to the average person under American standards" [p. 382, line 18, to p. 383, line 11].

Dr. Baxter replies to defense testimony [Rev. Glenn Whitlock] that *Tropic of Cancer* has redeeming social importance because Miller is attempting by tearing down some of the falseness of life to say what is real in life, and in doing so he is tearing down some values and saying they are not important:

> "That is a decent and valid function of the artist always, as much to clear away as to build. But it seems to me that when a man says, 'I am going to write a book which will be a prolonged insult, a gob of spit in the face of art, a kick in the pants to God, man'—now man is the theme of the whole business of literature. He is going to kick man out; he doesn't mean anything. He is pus, he is just nothing. 'I am going to throw out destiny, time, love, beauty,' I don't know what social value emerges here.
>
> "At the end of the book, the man returns like the dog to his vomit. He isn't redeemed. The reader is not put through a purgation, as the ancient Greeks had it, a washing, a purging of terror or pity to come out stronger.
>
> "I think the book is all of a piece. It ends as it begins. I can't feel out of this emerge any suggestion of what the man holds to be true and valid and good in the world. In fact, he denies all those words.
>
> "All I can say is this seems to be a tissue of calculated offense" [p. 385, line 17, to p. 386, line 9].

Commenting on Miller's lack of artistic integrity, Dr. Baxter states:

> ". . . Art is selective. But when an artist addresses himself to a public, he cannot, in the interests of a successful achievement of his art, violate all the commons and standards of that particular group to which he speaks. . . . Obviously he is speaking to the world. He makes that clear. This is a book to end all books, this is the final, last gasp of wretched, stinking, lousy, polluted man, to sum it up in gentle terms" [p. 436, lines 1-11].

And further:

> "He [Miller] repudiates the world. He flings us back into anarchy and chaos. The artist's business is to find meaning. His meaning is meaningless" [p. 411, lines 7-9].

Answering defense testimony [Dr. Otto Ficke, Assistant Professor of English, Los Angeles State College] that *Tropic of Cancer* has redeeming social importance, in that Miller depicts the sex life as it exists in the world of the average person in the community of Los Angeles:

> "If this book depicts the private life of the average citizen of Los Angeles, I welcome with great joy the hydrogen bomb. I can't believe that it depicted the life of France when this book was written, the expatriates in France. I can't think that it depicted the artistic life of France.
>
> "Though if it did, it would explain what happened to France at the beginning of World War II, although I think France would have exploded even before that had this been—No, no, this is an odd little corner, unless I am a very simple fellow.

"This is not a reproduction of the daily life of the average citizen in Los Angeles County. I sincerely doubt that" [p. 389, line 21, to p. 390, line 8].

Negating defense testimony [Rev. Paul Sawyer, Unitarian Minister] that Miller's work has redeeming social importance because it is a deeply religious book showing Miller as a religious man whose tormented soul-searching and candor might be compared to Christ's retreat into the wilderness:

"Well, my head reels at this semantic game. A religion is a philosophy of life which people believe so implicitly and fervently that they can live by it. I see no questing here for something by which a man can live; no attempt to explain the relation of man to time and the gods, the meaning of the world. No attempt to explain the sinister conspiracy of time and chance against man.

"I don't know what it means when it says 'This is a religious book,' and I suspect that we are having a sort of semantic holiday here when the term is used. Whatever it is, it isn't religious, I don't think.

"If it had a sort of questing zest—it might be going for a very ignoble target—I would accept it; but I see no target at all here of this descent into this festering muck. I see no end result which I could call religious nor do I see anything in the tome which suggests religion" [p. 392, line 16, to p. 393, line 6].

Dr. Baxter takes exception to defense testimony [Dr. Lawrence Clark Powell, Librarian, U.C.L.A.] that

Tropic of Cancer is a socially significant document of Bohemian expatriate life of the 1930's:

> "Out of the whole mass of men, one could imagine that somewhere there is a colony of one-legged, Chinese lepers with one eye. A man may write about them, the social significance for the generality of mankind would be little. I regard this society that he infested here as a society of a very few Chinese lepers with one eye and one leg. It's that remote from the current of the human race" [p. 466, line 26, to p. 467, line 7].

Dr. Baxter minces no words in finding an utter lack of redeeming social importance to *Tropic of Cancer:*

> ". . . I cannot find 150 lines in the whole book [*Tropic of Cancer*], in this big book, which seemed to me to be redeeming" [p. 379, lines 3-5].

Emphasizing the effect of *Tropic of Cancer* on the "average person" in the community, and dwelling upon the word "redeeming," Dr. Baxter continues:

> "To the average person in the community, I can see no significance or social importance in this book. Granted that word 'utterly' is, of course, a difficult one, I grant that here and there there are pictures of the city at night, there are little intrusive passages which might perhaps, to some people, justify it but not to me; because it seems to me that the word 'redeeming' would imply that there was something in this book so transcendently important as to overrule the general impact of the book, which I find very distressing" [p. 383, lines 10-21].

And further:

> ". . . But again I can't feel that if you picked out on the pages of this book, which are over 320, let us say, if you picked out 20 pages which would be defensible, they would constitute enough redeemable, redemptive material to justify the ugliness, the scatalogy, the prurience of the rest" [p. 460, lines 18-22].

Mrs. C. H. Culbertson

[Rep. Tr. Vol. 3, pp. 529-542]

President of the State of California Congress of Parents and Teachers, also known as the PTA [p. 529, lines 16-17]. The California Congress of Parents and Teachers comprise an organization of over a million and a half members [p. 529, line 23], making this group the largest parent-teacher assemblage within the continental United States.

Mrs. Culbertson testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as this term is defined by Section 311(a) of the Penal Code [p. 532, line 3, to p. 533, line 19].

Summing up *Tropic of Cancer,* Mrs. Culbertson stated:

> "I think it is a very filthy book" [p. 535, lines 6-7].

Arthur J. Kates

[Rep. Tr. Vol. 2, pp. 438-528]

Owner-manager of the Sunset News Co., 125 N. Westmoreland, Los Angeles [p. 440, lines 21-24], the largest distributor of periodicals in California, and

one of the two or three largest distributors in the continental United States [p. 442, lines 2-8].

Mr. Kates' Sunset News Co. distributes ninety per cent of all periodicals sold in the Los Angeles basin (roughly equivalent in area to Los Angeles County) [p. 442, lines 14-21].

Sunset News Co. distributes to 1400 different accounts [p. 443, line 9]; including such department stores in Los Angeles as Bullock's, the May Company, the Broadway, Robinson's [p. 443, lines 14-15]; such supermarkets as Ralph's, Market Basket, Alpha Beta, Safeway, Mayfair, A&P [p. 443, lines 20-24]; such drug stores as Owl, Thrifty, Save-on [p. 443, lines 8-12]; such bookstores in the city of Los Angeles as Fowler's, Pickwick, Campbell's, Martindale's [p. 444, lines 13-17], and such universities as U.S.C., U.C.L.A., Los Angeles State College [p. 444, lines 19-22].

The volume of Sunset News Co. periodicals sold to their 1400 accounts in 1961, included 22 million single magazine copies and 5 million copies of paperback books [p. 445, lines 4-8]. Sunset News Co. distributes between 200 and 250 different titles of books and magazines per week [p. 446, line 26].

The magazine titles run the gamut from Saturday Evening Post, Look, Life, Time [p. 515, lines 8-10]; to such girlie magazines of nude models and chorus girls as Dude, Gem and Playboy [p. 475, lines 1-3; p. 483, lines 16-18].

Mr. Kates has a Bachelor of Arts degree from Stanford University and was a member of Phi Beta Kappa while at Stanford [p. 439, lines 6-20].

Mr. Kates has been a resident of Los Angeles for 50 years [p. 438, line 23]; has been in the periodical distributing business for over 25 years in Los Angeles [p. 446, lines 8-11], and has by virtue of this experience, an intimate knowledge of the books and magazines that circulate as community standards in the community of Los Angeles [p. 446, lines 12-20].

The paperback edition of *Tropic of Cancer* was offered to Mr. Kates by Grove Press for distribution to his 1400 accounts prior to the arrest of defendant Bradley Reed Smith [p. 450, lines 15-27], an offer which Mr. Kates refused [p. 451, line 22].

Mr. Kates testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as the term is defined by Penal Code Section 311(a) [p. 451, line 14, to p. 452, line 25].

Asked whether in his experience *Tropic of Cancer* goes substantially beyond customary limits of candor in description of sex, nudity or excretion in the community of Los Angeles, Mr. Kates replied:

> "I don't think there is any question about that." [p. 452, line 7].

As to the utter lack of redeeming social importance of *Tropic of Cancer,* Mr. Kates stated:

> "I was unable to find any redeeming social importance. I feel strongly that it is without it." [p. 452, lines 15-16].

In a graphic summation of both the author and *Tropic of Cancer,* the witness concludes:

> "I think that, by and large, the book, taken as a whole, is the demented outhouse scrawlings of a demented mind." [p. 453, lines 7-9].

Dr. Raymond Lindquist

[Rep. Tr. Vol. 5, pp. 894-937]

Senior Minister of the Hollywood First Presbyterian Church since 1953 [p. 894, lines 20-26].

Dr. Lindquist's church has a congregation of 8,000 members, making it the largest Presbyterian Church in the continental United States, and probably the largest in the world [p. 895, lines 3-9].

Dr. Lindquist received his Bachelor of Arts degree from Wheaton College, Illinois; attended Columbia University Law School for one year; acquired a Bachelor of Theology at Princeton Theological Seminary, and a Master of Arts in philosophy at Princeton. Dr. Lindquist is the recipient of an Honorary Doctor of Divinity degree from Cumberland University, Tennessee, and an Honorary Doctor of Laws from Bloomfield College, Bloomfield, New Jersey [p. 899, lines 11-18].

Dr. Lindquist, in addition to his position as Senior Minister of the Hollywood First Presbyterian Church, is also President of the Board of National Missions of the Presbyterian Church [p. 895, lines 22-23]; a Trustee of Princeton Theological Seminary [p. 896, lines 14-15], as well as a Director of the Presbyterian Ministers Fund, the oldest insurance company in the United States [p. 897, lines 2-3].

Dr. Lindquist testified *Tropic of Cancer* was "utterly without redeeming social importance" and obscene as this term is defined by Penal Code Section 311(a) [p. 897, line 11, to p. 898, line 4].

Relating the obscene parts of *Tropic of Cancer* to the non-obscene portions Dr. Lindquist states:

> "You will find in a book . . . in this book, according to my thinking, islands of material like this, in an ocean of obscenity . . ." [p. 909, lines 6-8].

Commenting on what the witness feels to be the author's deliberate attempt at portraying obscenity without motivation:

> "It is a book that I read with great dismay. I wasn't shocked at it, but I was deeply dismayed, and I was impressed with what appeared to be a deliberate attempt from page to page to slide into the gutter without reason. There seems to be no motivation in my mind for wallowing in the dirt in this fashion." [p. 898, lines 7-13].

Dr. Howard S. McDonald

[Rep. Tr. Vol. 5, pp. 779-817]

President of Los Angeles State College [p. 779, line 23] since 1958 [p. 780, line 3]. Los Angeles State College has an enrollment of 16,000 students [p. 780, lines 6-7].

Past President of Brigham Young University [p. 781, lines 1-2]; Past President of the combined Los Angeles City and Los Angeles State Colleges from 1949 to 1958, with an enrollment of 28,000 students [p. 781, lines 8-18].

Bachelor of Science degree at Utah State University; Masters and Doctorate of Philosophy degrees from University of California at Berkeley.

Dr. McDonald testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as

this term is defined by Penal Code Section 311(a) [p. 783, lines 1-18].

After reading *Tropic of Cancer*, Dr. McDonald wanted "to take a bath":

> "When I read the *Tropic of Cancer*, I will use it as an illustration—I was disgusted. After I got through reading the book, I wanted to take a bath. That's the impression it gave me. I felt that I'd get veneral disease just from reading the book, it was so filthy, rather condoning that kind of life in the world." [p. 802, lines 18-23].

John Otis Carney

[Rep. Tr. pp. 831-875]

Professional writer [p. 831, line 20].

Bachelor of Arts in English from Princeton University [p. 831, lines 23-26].

Author of four published novels: *Love at First Flight, When the Bow Breaks, Yesterday's Hero* and *Good Friday, 1962* [p. 832, lines 11-15].

Author of the films: "Cinerama Holiday [p. 838, lines 7-10] and "Pete Kelley's Blues" [p. 839, line 4].

Author of articles for Collier's and Coronet magazines [p. 839, lines 19-21].

Mr. Carney has reviewed books for the *Chicago Tribune, Minneapolis Star* and the *Los Angeles Times* [p. 840, lines 9-11].

Author of television productions for Walt Disney, Jack Webb ("The D.A.'s Man") and has written the script for such television dramas as "Zane Grey Theatre," "The New Breed," and "Going My Way."

Mr. Carney testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as the term is defined by Penal Code Section 311(a) [p. 841, line 8, to p. 842, line 4].

Mr. Carney states that as an author he is inherently opposed to censorship:

> "As a writer, I am naturally inherently opposed to censorship. I think that any writer, by his very nature, has sort of a burr under his saddle blanket. He wants to change the world for the better or else he wouldn't be a writer.
>
> "Therefore, any pressures that tend to make him back off on this become inimicable to his work as a writer. I think Budd Schulberg expressed it very well when he said, 'You scratch a novelist and underneath you find a moralist.' "

However, the lack of redeeming social importance of *Tropic of Cancer* prompts the witness to continue:

> "But I really believe that this book goes so far beyond having any social significance or importance that it vitiates its entire premise as a novel, as a work of art, and it vitiates its effectiveness" [p. 842, lines 7-21].

Mr. Carney, as an author, clearly and carefully defines the two-fold social obligation of any writer:

> "I think that the author has two responsibilities; one of them is to his own craft, to be honest as he can in his reporting; and the second responsibility is to the public at large. And its this area that I feel an author must not go beyond the limits. He must set these standards for himself and the standards are quite easy to find. I used the

analogy of writing profanity on the wall out there. I can't do it as an individual citizen nor can I do it really as an author" [p. 875, lines 12-20].

Mr. Carney interprets the significance of *Tropic of Cancer* in terms of a descriptive analogy to a World War II incident:

"Now the book [Tropic of Cancer] reminds me, actually, of an incident that took place during the war. And this was a Japanese officer who came rushing down out of the hills determined to make war, and when he got down—this happened on the Island of Guam—he found everyone going to movies and PX's, and no military people around. And here he was so anxious to fight this battle and yet nobody would fight him.

"And he finally went into an airplane—it's a tragic little story, really—and got in the plane behind the pilot's seat and he was so mad by this time he had to blow something up. He had two grenades.

"He got in the plane and the mechanic got in the plane. He thought it was the pilot. And the poor fellow blew the plane apart.

"What he didn't realize was that the war had been over for nearly a year and the plane was being taxied out to be dumped off the end of the runway.

"Now I cite this long story because I think this is what happened to Henry Miller, in effect. I think that Mr. Miller was fighting a war. He came down out of the hills of Paris to fight the war of what he called the 'revolt against reason'" [p. 842, line 22, to p. 843, line 18].

The witness defines what is meant by the "revolt against reason":

> "This [revolt against reason] took place in the 20's and in the 30's. And this was to break out from all authority and to be able to say and do everything. This traces back to Freud, Marx, and to the American depression, to many themes that historically are present at this time.
>
> "But the problem was that when Mr. Miller ran down out of the hills, with all this anger against the world, unfortunately, the war had been won by many other very effective American authors, who had plowed this same ground before, who had revolted from reason earlier, who had written about Paris and all this expatriate life and this faded disillusionment with the world" [p. 843, line 19, to p. 844, line 4].

The witness explains how Miller resolves the unpleasant fact that great authors have already written about the same subject as Miller is attempting to portray:

> "Now it seems to me then, at this point, Mr. Miller faces the terrible problem of a writer who realizes that great people have written about the very same subject that he wants to write about. Now how is he going to top them?
>
> "Perhaps he would go as far as trying to top them by the surrealistic style of the book; but yet that had been done, too.
>
> "So, perhaps, he would even go as far then as trying to totally bathe in what I consider personally, at heart, obscenity."

Author Carney analyzes Miller's irresponsible use of the "four letter" word:

> "Now it seems to me that when you study these three or four limits here, in the first place, Anglo-Saxon words have always been a part of our language and they have appeared in books. Certainly there was no more violent time of the usage of these words than, for instance, in the Civil War, where most of the population was uneducated. And yet we don't find these words in Whitman, who chronicled that time. We don't find them in really any of the great works of that era" [p. 844, line 20, to p. 845, line 2].

Miller's unique use of the "four letter" word as narrative description, rather than dialogue is cause for the following commentary:

> "Now where Mr. Miller further uses these words in a way that I consider irresponsible—these words occur often in the dialogue of people, in profanity, or in anger of some form or other—but Mr. Miller uses these words in the subjective narrative of the book. He writes—in his own thoughts these words appear. Now this removes it slightly from strictly being accurate and realistic in dialogue" [p. 845, lines 3-24].

Author Carney negates the fact that *Tropic of Cancer* has "redeeming social importance":

> "Now I think that secondly, when we talk about: Does the book have any social importance? The book does not have a meaning nor does it promise any rehabilitation for, we will say, the prostitute of Paris or this sort of life. It makes no social plea. And it gives no hope" [p. 845, lines 3-10].

On the lack of educational value to the student:

"Now when we go to the third point, which is basically: Does the book have any value to the student? Does it have any educational merit?

"It seems to me again that what Mr. Miller has done in the book has been better done in terms of writing by many other people; and beyond that, if we are dealing with the sexual act itself, I dare say Kinsey or any of the manuals on sexual habits, Krafft-Ebing, any of these could be far better guidebooks for the student" [p. 845, lines 10-24].

The witness compares *Tropic of Cancer* to other books which have "redeeming social importance":

"I don't think that the comparison of this book [Tropic of Cancer] to [Upton Sinclair's] *The Jungle* is at all valid [as testified to by defense witnesses]. As I said, I don't believe this book [Tropic of Cancer] has social importance.

"The *Jungle* dealt with the slaughtering of animals and it became the forerunner, I am told, of the Pure Food and Drug laws. This affected literally millions of people.

"Other books of social importance, like Sinclair Lewis' *Main Street*, for instance, where he was fighting against the narrow mores of Main Street, it again affected a tremendous segment. But Mr. Miller is really referring only to a tiny portion of expatriate people, who have lost their way, and are living in this Paris world in a sort of dream world.

"Therefore, the other books promise—they say, 'Here is a problem. Now, Society, you must solve this problem.'

"But Mr. Miller states no problem that I clearly can see, except that he tries to reduce man to the level of a total animal. That becomes man's problem, that he has no dignity at all, if we are to believe Mr. Miller, and I don't believe that, so I think it, therefore, it has no social importance" [p. 848, line 10, to p. 849, line 6].

Mrs. Edith Stafford

[Rep. Tr. Vol. 4, pp. 668-711]

Past President, Los Angeles City Board of Education [p. 670, lines 19-20] and a member of the Board for six years [p. 670, lines 15-16].

At present, lecturer to women's clubs, PTA's, and parent groups throughout California [p. 668, lines 21-23].

Bachelor of Arts degree, Pomona College [p. 668, line 26]. Resident of Los Angeles for 36 years [p. 668, line 18].

Mrs. Stafford testified the book *Tropic of Cancer* is "utterly without redeeming social importance" and is obscene as this term is defined by Penal Code Section 311(a) [p. 674, line 4, to p. 676, line 18].

Comments Mrs. Stafford on the lack of "redeeming social importance of Tropic of Cancer":

"My opinion is that it does not have any redeeming social importance. It is a filthy, dirty, obscene, objectionable book and has no redeeming feature, in my estimation" [p. 676, lines 9-12].

Mrs. Stafford inveighs against the irresponsible use of language and sex in *Tropic of Cancer:*

> "The language is so filthy and so objectionable that it is an offense to every standard in our society. It is an offense to marriage, to religion, to the family, to every man and woman of decency. The book is filled with this obsession with sex, including adultery and sodomy. Certainly something which society should protect itself against" [p. 677, lines 18-25].

Dr. C. C. Trillingham

[Rep. Tr. Vol. 4, pp. 626-667]

Los Angeles County Superintendent of Schools since 1942 [p. 626, line 25; p. 627, lines 1-8]. Dr. Trillingham has jurisdiction over 1500 schools which comprise Los Angeles County, including all public schools from elementary through junior college [p. 627, lines 9-17], encompassing an enrollment of 1,500,000 pupils [p. 628, lines 11-12].

Dr. Trillingham received his Bachelor of Arts, Master of Arts and Doctor of Philosophy degrees from the University of Southern California [p. 628, line 23, to p. 629, line 4].

Past President of the American Association of School Administrators for the year 1958, a nation-wide organization comprising 13,000 educators [p. 630, lines 18-26].

Past President of the Los Angeles Lions Club [p. 629, lines 5-10]; member of the Board of Trustees of Whittier College for 17 years [p. 630, lines 4-5]; member of the Board of Trustees, Los Angeles College of Osteopathic Physicians and Surgeons [p. 630, lines 6-

7]; member for the past 17 years of the State of California Curriculum Commission.

Dr. Trillingham testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as this term is defined by Section 311(a), Penal Code [p. 633, lines 1-19].

Stated Dr. Trillingham:

> "The book seems to deal with the preoccupation of sex and filth that I think is below the standard of the average citizen . . ." [p. 633, lines 21-23].

Dr. Ellis A. Jarvis

[Rep. Tr. Vol. 5, pp. 818-849]

Retired Superintendent of Schools for the Los Angeles City School District [p. 818, lines 23-25]. As Superintendent for the Los Angeles City Schools, Dr. Jarvis had 575 schools under his direct supervision from kindergarten through junior college, encompassing 675,000 pupils [p. 819, lines 9-16].

Bachelor of Arts degree from the University of California at Berkeley; Master of Science degree from the University of Southern California. Honorary Doctorate degree from the Los Angeles College of Osteopathic Physicians and Surgeons [p. 819, lines 19-23; p. 822, lines 1-2].

Dr. Jarvis testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as this term is defined by Penal Code Section 311(a) [p. 822, line 21, to p. 823, line 19].

Stated Dr. Jarvis concerning the prurient appeal of *Tropic of Cancer:*

> "It seems to me the main burden of the book is almost total concern and description of functions of reproduction and excretion and the use and misuse thereof, the perversion thereof and so on . . ." [p. 823, lines 20-25].

Marie Louise Kearns

[Rep. Tr. Vol. 10, pp. 778-830]

Author, lecturer, book reviewer, and teacher of creative writing [p. 779, lines 17-18], using the pen-name of Marie Metlova and Louise Hathaway [p. 779, lines 21-22].

Author of three published novels: *No Stranger to My Heart,* which was reviewed by the New York Times and other national reviews; *Black Bread and Caviar,* under the pen-name Maria Metlova, and the *Enchanted Hour* [p. 780, lines 7-16].

Mrs. Kearns testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as the term is defined by Section 311(a) of the Penal Code [p. 783, lines 15-16; p. 784, lines 1-25].

Commenting as an author on Miller's misuse of sex in *Tropic of Cancer:*

> ". . . As an author, I would say that the writer—or as a person, the writer equates sex with vomit, bowel movements, toilet intercourse; and that if every writer were to follow this procedure, it would set the world of romance back to the caveman days." [p. 784, lines 3-7].

Continues the witness by analogizing to the beauty of the naked form:

> "There is beauty, for instance, in a very beautiful naked body. But let us say that some naked person were to walk in public and suddenly go to the bathroom. Where is the beauty? The beauty is obscured by the act. . . . What he does here, he takes an incident and he inserts just enough in that incident to lead him into an overwhelming portion of lurid sex and perversion. It isn't even good writing in this standpoint because it doesn't point out anything except a monotonous picture of degredation." [p. 785, lines 7-25; p. 786, lines 1-4].

Mrs. Kearns likens Miller's over-use of sex to the overseasoning of food:

> "I could liken it to—I will use another analogy. If I were cooking a very delicious dish and I wanted to season it, if I put nothing but seasoning in that dish, it wouldn't be fit to eat. It wouldn't be worth anything. And this is what he has done. Whatever little bit of beauty—and I am not denying that there are portions, but whatever he has done he has overwhelmed them.
>
> "I felt, when I had finished this book, that I had walked through fields of dung just to pick a flower here and a flower there." [p. 786, lines 5-15].

Mrs. Kearns criticizes Miller's misuse of language and his obsession with sex:

> "I don't believe that he has used language to the fullest. The language, to be powerful, must

impress to the finest sense and promote the subject that he is trying to bring forth.

"If the subject is consistently and repetitiously sex in its various forms, I do not call it power. He uses the same words over and over and over again with such repetition that it becomes sickening. . . .

"It's an obsession on one point. It's just like an artist would become obsessed and he would have a picture, he is trying to portray a countryside, but all he is putting in that one picture, just one thing, rocks, rocks, rocks, rocks. You can't see the sky; you can't see the trees. They are there, but you can't see them." [p. 788, lines 1-17].

Father Clarence E. Crowther

[Rep. Tr. Vol. 10, pp. 584-603]

Senior Episcopal Chaplain, University of California at Los Angeles [p. 584, lines 24-26].

Bachelor of Arts degree, University of Leeds, England; Bachelor of Laws and Master of Laws, University of Leeds. Past professor of criminal and constitutional law, Oxford University [p. 585, line 23, to p. 586, line 7].

Graduate of Oxford Seminary, Oxford, England; ordained to the ministry of the Church of England in 1956 [p. 586, lines 11-13].

Father Crowther testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as this term is defined by Penal Code Section 311(a) [p. 588, line 8, to p. 589, line 9].

Commenting on the lack of "redeeming social importance" in *Tropic of Cancer,* Father Crowther states:

> "I think the phrase 'redeeming social importance' would be ludicrous as applied to this book [Tropic of Cancer]. I do not think it has any." [p. 589, lines 4-6].

Referring to Miller's purpose in writing *Tropic of Cancer,* says Father Crowther:

> "As I remember it, on page 2, I think, of the book, he describes what I interpret to be his purpose in writing the book and I find it very difficult, with this motivation, the author seeks to offer a service to a society which he so obviously despises.
>
> "And I think that the language used constantly in the book to get across the purpose which he describes here most certainly, in my experience, goes far and away beyond that which is normally accepted to be customary standards of expression." [p. 589, lines 18-26].

Father Crowther states the impression *Tropic of Cancer* made upon him:

> "The book as a whole gave me the impression, in the few pages where I did not think that it was obscene, of a rather pleasant walk down a country lane; but the snag is that every stopping point was a brothel. And I couldn't see what on earth the man was trying to get at, other than in the light of what he says here—and I hope I am privileged in this court—to simply spew out upon the face of society the excretion of the sickest mind that I think I ever heard of. I think that the method of

the treatment of women is degrading; it is humiliating; it is sordid and utterly without merit or certainly without redemption, as I understand the word." [p. 580, lines 1-12].

On Miller's demeaning of sex:

"I think that his treatment of sex, which to me is a thing of great beauty and sacramental significance, his treatment of sex is a constant and wild orgy which, I think, demeans a beautiful thing." [p. 590, lines 13-16].

On Miller's treatment of society:

"I think that his treatment of society as a whole does not in any way offer solutions to what we all know to be the problems of society; but overall it is the method of treatment which I found sickeningly repulsive, and if this book were a book written for psychiatrists in order to examine a sick mind, then I think it would be one of the most important books every written. But I don't think that that was the purpose of the commercial production of this book.

"If it could be confined to people who were to examine diseases of the mind scientifically then, perhaps it may be significant. But certainly not, I think, in the general accepted intention of its publication." [p. 590, line 17, to p. 591, line 3].

In refuting a comparison made by defense experts [Rev. Paul Sawyer, Unitarian Minister, Dr. Jack Hirshman, Assistant Professor of English, U.C.L.A.] of Miller's affinity to Jesus Christ, Father Crowther states:

"No, I don't think that he can be compared with Christ and I would find it very difficult,

indeed, to swear on oath before this court on the *Tropic of Cancer* as I would upon the book which describes the life of Christ." [p. 594, line 24, to p. 595, line 1].

Dr. Warren S. Jones

[Rep. Tr. Vol. 10, pp. 702-778]

Chairman of the Department of Speech and Dramatic Arts at Pepperdine College, Los Angeles [p. 703, lines 12-14]. Pepperdine College has an enrollment of approximately 1450 students [p. 707, line 14].

Dr. Jones teaches at the present time courses in rhetorical criticism (which includes the evaluation of written as well as oral discourse), advanced oral interpretation, and basic speech. Dr. Jones is presently directing four Master's degrees [p. 703, lines 24-26].

Dr. Jones received his Bachelor of Arts degree from David Lipscomb College, Nashville, Tennessee; Master's degree and Doctor of Philosophy degree from Wayne University [p. 704, lines 8-25].

Dr. Jones is an active speaker for various social clubs in the community, including Kiwanis, Rotary, Women's Club of Los Angeles, and the Lions Club [p. 705, lines 16-18].

Dr. Jones is a reserve Deputy Sheriff for the County of Los Angeles, but has no connection with the Los Angeles Police Department [p. 706, lines 2-3; p. 707, lines 4-6].

Dr. Jones testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as this term is defined by Penal Code Section 311(a) [p. 708, line 4, to p. 709, line 6].

Dr. Jones explains his reaction to reading *Tropic of Cancer:*

> "From the first page through the first time that I quit reading, which was 10 or 12 pages, I ran into nothing but sexual atrocities and what I would call 'animalism.' I had a lot of difficulty continuing to read because it did not hold my attention because of its sexual abnormalities and again the word 'animalism.' " [p. 711, line 25, to p. 712, line 4].

In reply to defense testimony [Assistant Professor of English, Henry Coulette, Los Angeles State College] that *Tropic of Cancer* will give an accurate view of 20th Century life to future generations, much like Shakespeare's view of 16th Century London:

> "I should hate to think that any future generation will evaluate our values by *Tropic of Cancer.* If we have become this degraded, I am ashamed of society" [p. 713, lines 16-18].

Thomas A. Devine

[Rep. Tr. Vol. 10, pp. 604-641]

Professor of Sociology, Pierce College, Los Angeles [p. 604, lines 18-20]. Pierce College has an enrollment of approximately 9,000 students [p. 605, line 3].

Professor Devine received his Bachelor and Master's degrees from Gonzaga University, Spokane, Washington [p. 606, lines 12-15].

Professor Devine testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as this term is defined by Penal Code Section 311(a) [p. 606, line 19, to p. 607, line 26].

Commented Professor Devine on the total lack of "redeeming social importance" of *Tropic of Cancer*.

> ". . . I think, according to this standard, the book would definitely be obscene. And what's more, I might add that I happened to take a notebook when I went through it, on the 5th point ['and is utterly without redeeming social importance'], to see if I could find anything of social importance. And I ended up without making a single note under that heading" [p. 707, lines 2-7].

And further:

> "I would say it has no redeeming importance because I would say that if it helped a person to find any self, it would be a self not worth finding, a degenerate, degraded self that it would help a person become, and that it does not depict sex as it exists but only as it exists in an extremely small, degraded segment, of which this man apparently sought out and lived with" [p. 609, lines 7-13].

Noting Miller's almost total preoccupation with sex, Professor Devine remarked:

> "It seems that this man [Miller] goes through his days almost with blinders on. He doesn't seem to see anything but these things. We can imagine some people walking down a street and looking at the birds or the trees but this man mainly seems to listen to toilets flushing or manure smeared all over everything. Then these passages have been mentioned before dealing with sex and sex perversion in a very degraded, unhealthy, immoral, I would say, close to degenerate approach all the way through the thing" [p. 608, lines 3-11].

Mrs. Elizabeth Lewis

[Rep. Tr. Vol. 5, pp. 850-859]

Past Chairman and present member of the Board of Trustees, California Women's Prisons [p. 851, lines 4-15].

Mrs. Lewis received her Master's degree from the University of Edinburgh, Scotland [p. 851, line 23, to p. 852, line 2], and has resided in Los Angeles for 36 years [p. 851, line 1].

Past President of the Los Angeles Tenth District P.T.A. from 1952 to 1954, which included the entire Los Angeles City School District [p. 852, lines 18-26].

Past President of the Federation of Community Co-ordinating Councils from 1946 to 1949. This is an organization made up of 100 local community councils whose functions are to deal with all types of problems arising in the community [p. 853, lines 7-24].

Past President of the Los Angeles YWCA for 3 years [p. 854, lines 6-8].

Past member for 6 years of the Citizens Advisory Committee to the Attorney General on Crime Prevention [p. 855, lines 4-10].

Mrs. Lewis testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as this term is defined by Penal Code Section 311(a) [p. 855, line 22, to p. 856, line 11].

Mrs. Lewis describes her revulsion of the morbidness of Miller's treatment of sex:

> "I found when I did read the book I was revolted in the extreme. I found there was very definitely an interest which seemed to me morbid

in the physiological descriptions of the sexual act and of excretion, and described in such terms—Well, the only thing I can think of is that the author seemed to me to be just wallowing in barnyard filth and using barnyard terms to describe grossly physiological acts" [p. 856, line 26, to p. 857, line 7].

Rabbi Ernst R. Trattner

[Rep. Tr. Vol. 9, pp. 449-581]

Rabbi of Westwood Temple [p. 500, line 20]. Westwood Temple has a congregation comprising 700 Jewish families. Rabbi Trattner has resided in Los Angeles for 40 years [p. 500, line 23].

Rabbi Trattner received his Bacherlor of Arts degree from the University of Southern California, a Master's degree from Columbia University, and Honorary Doctorate degrees from Andhra University, Jaipur, India, the University of Bari, Italy, and the Institute of Religious Science and School of Philosophy of Los Angeles [p. 501, line 1, to p. 502, line 4; p. 566, lines 5-19].

Rabbi Trattner is the author of five published books: *Unraveling the Book of Books, The Autobiography of God, As a Jew Sees Jesus, The Architect of Ideas,* and *Understanding the Talmud* [p. 503, lines 1-21].

Rabbi Trattner served as religious consultant to the late C. B. De Mille for the motion picture "The King of Kings" [p. 503, line 21] and served as Past President of the Los Angeles Chapter of the American Jewish Congress [p. 503, lines 24-26].

Rabbi Trattner testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as

this term is defined by Penal Code Section 311(a) [p. 505, line 23, to p. 507, line 9].

The Rabbi defines the word "redeeming" and notes the complete absence of any redemptive qualities in *Tropic of Cancer*:

> "The word redeeming implies redemption, and redemption means that you are moving from a bad situation to a better situation. I do not see where the writing of Mr. Miller helps the individual reader to move from a bad situation to a better situation" [p. 507, lines 1-5].

Commenting on Miller's defilement of all spiritual and physical life, and his lack of ability to leave the average person with any emerging social value:

> "Mr. Miller's whole outlook upon life is one of defilement, defilement of every physical and spiritual motivation. I could not find within the writing of that book one ennobling sentence or paragraph that would enable one to feel that this is material that could be of help to any human being. On the contrary, I found sentences very derogatory to everything that I stand for in life. I found it deeply offensive; I found it wallowing in putrification. . . . I thought, as I finished the book, 'What would happen to its sales if every defiling word or sentence were to be removed? What would then be left?' The answer is, 'Nothing of any value to the reader'" [p. 507, line 13, to p. 508, line 3].

Dr. Joseph Paul De River

[Rep. Tr. Vol. 11, pp. 877-891]

Psychiatrist and Physician and Surgeon [p. 877, line 24].

Dr. De River took pre-medical training at the University of Alabama and his Doctor of Medicine degree at Tulane University; Dr. De River interned at Allegheny General Hospital and St. Joseph's Hospital in Reading, Pennsylvania, with specialties in brain surgery, and nervous and mental diseases [p. 879, lines 4-11; p. 891, lines 25-26].

Dr. De River is a Fellow of the American College of Surgeons [p. 880, lines 8-11]; is employed in an advisory capacity to the Los Angeles Municipal and Superior Courts [p. 878, line 20] and has served as a Medical-Legal member of the Adjudication Board of the Sawtelle Veterans Hospital [p. 883, lines 5-7].

From 1937 to 1950, Dr. De River served as Psychiatrist for the Los Angeles Police Department, as well as a consultant to the Arson Bureau, Los Angeles Fire Department [p. 883, lines 10-13].

Dr. De River is author of the published books, *The Sexual Criminal* and *Crime and the Sexual Psychopath.*

Dr. De River testified that *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as this term is defined by Penal Code Section 311(a) [p. 884, line 19, to p. 885, line 17].

Commenting on the author's purpose in writing *Tropic of Cancer*:

> "He [Miller] is describing sexual pictures here, the interest in the various and anatomical parts of the female, interested in close-ups of excretions,

the interest in odors, the odor fetishes that are brought out in this book, the interest in the way he works himself up into a sexual frenzy, apparently by a crescendo, a buildup; one filthy four-letter word after another, built up one after another" [p. 888, line 24, to p. 889, line 8].

Dr. De River feels that *Tropic of Cancer* belongs in the "case history" file of the psychiatrist:

> "In my opinion, that [Tropic of Cancer] belongs in the psychiatric files of some psychiatrist that's handling the case" [p. 911, lines 21-22].

And further:

> "I think that it should be in the files of some psychiatrist who keeps a case history of those kinds of things—that's the only place for it—dealing with sexual perversions" [p. 912, lines 15-18].

Dr. Marcus Crahan

[Rep. Tr. Vol. 10, pp. 642-687]

Psychiatrist and Physician and Surgeon [p. 643, line 10].

Medical Director of the Correctional Facilities of Los Angeles County, with 8,000 inmates under his direct supervision and control [p. 643, lines 11-15; p. 648, lines 1-2].

Dr. Crahan is presently a member of the Los Angeles Superior Court panel of psychiatric experts and is also a member of the Department of Mental Hygiene for Los Angeles County [p. 643, lines 16-18].

Dr. Crahan has conducted psychiatric examinations, by court appointment, for between 5,000 and 19,000 individuals [p. 644, lines 7-9].

Dr. Crahan received his Bachelor of Arts and Doctor of Medicine degrees from Syracuse University. He has resided in Los Angeles since 1925 [p. 643, line 4, p. 644, lines 10-25].

Dr. Crahan is currently a professor at the University of Southern California School of Medicine, and on the staff of St. Vincent's and Los Angeles County Hospitals [p. 645, lines 1-7].

Dr. Crahan has conducted psychiatric and medical research at U.C.L.A., California Institute of Technology, Johns Hopkins University and U.S.C.

Dr. Crahan has served as Past Chairman of the Church and Community Committee of Los Angeles, which committee is comprised of all the major churches, leading educators, citizens, public officials, and members of the judiciary, whose function is to deal with the problem of sexual deviancy in Los Angeles [p. 645, lines 13-23].

An avid book collector, Dr. Crahan is a regular supporter of such libraries as Princeton, Syracuse, Claremont, Occidental, California at Berkeley, the Southwest and Los Angeles County Museums [p. 646, lines 21-24].

As a collector of books, Dr. Crahan is a member of such book collectors' clubs as Grolier's of New York, the Roxboro of San Francisco, and the Zamarano of Los Angeles. He has served as Past President of the Zamarano Club of Los Angeles [p. 646, line 25, to p. 647, line 3].

Dr. Crahan's personal library consists of between three and four thousand volumes of books [p. 647, lines 16-17].

Dr. Crahan's opinion is that *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as this term is defined by Penal Code Section 311(a) [p. 648, line 9, to p. 649, line 22].

Dr. Crahan, in describing why he feels *Tropic of Cancer* is obscene, states where he believes Miller received his main source of inspiration to write the book:

> "I believe it [Tropic of Cancer] is obscene because the writer, who has an excellent vocabulary, preferred to use vulgar vernacular and descriptions that are not used in print or in public in good society.
>
> "This is an autobiography, a Freudian couch catharsis, in which the writer exposes his weaknesses and his personal interest, his rectal vanity and uses his genitals as his main source of inspiration." [p. 649, line 24, to p. 650, line 4].

Continues Dr. Crahan:

> "He uses his penial organ as a scriber's tool and he uses excretions as his ink." [p. 650, lines 5-6].

Dr. Crahan believes *Tropic of Cancer* is not fit for sale to the public, but is a case history of a sick mind:

> "I believe this book is for cannibals and animals and not for human distribution. I believe it is not a social study.
>
> "I believe, rather than this, that it is a case history of a sick man. This man further goes be-

yond acceptable practices by stating that he is inhuman, that he does not belong to man or governments, does not believe in creeds or principles. This man writes deliberately and defiantly an insulting thing, a slap in the face to the average American, because he dislikes America; he is spitting in Uncle Sam's face in this work" [p. 650, lines 7-17].

Dr. Crahan stresses the lack of redeeming social value of *Tropic of Cancer:*

"I can see nothing about it that is redeeming. This book, however, should not be burned or destroyed. I don't believe in this. The book should be kept for research and locked up as any case history should be" [p. 650, lines 18-21].

The lack of humor in *Tropic of Cancer:*

"There is no humor in this book. This is a sadistic work" [p. 651, lines 18-19]:

The misuse by Miller of the "four-letter" word:

"The average use of the four-letter words in America or in this community are words to express annoyances; they are expletives and have not any direct meaning, whereas, this writer describes these matters and substances and offensive things as literate things, as they are" [p. 652, lines 1-6].

Dr. Crahan comments that one may be prompted to experiment in these deviant sex practices:

"I believe that the average person who picks up the book from the standpoint of curiosity may be excited to experiment curiously in some of these deviant practices that the writer advocates" [p. 651, lines 10-13].

In answering defense testimony [Dr. Otto Ficke, Assistant Professor of English, Los Angeles State College] that Miller depicts the sex life as it exists in the private world of the average person in the community:

> "This is not true. According to any research that I know about or according to my own case files, this is not an average experience of the average person" [p. 652, lines 7-25].

Leon Uris

[Rep. Tr. Vol. 11, pp. 1088-1106]

Professional writer [p. 1088, line 24].

Author of such internationally famous novels as *Exodus, Battle Cry, The Angry Hills,* and the current best-seller *Mila 18* [p. 1089, lines 15-26; p. 1091, lines 20-21].

Wrote the screen play for the motion pictures "Battle Cry" and "Gun Fight at OK Corral" [p. 1091, lines 4-5].

Mr. Uris testified *Tropic of Cancer* was "utterly without redeeming social importance" and obscene as this term is defined by Penal Code Section 311(a) [p. 1098, line 11, to p. 1099, line 2].

In stating why *Tropic of Cancer* is obscene, Mr. Uris premises his conclusion on the principle that the writer owes a definite responsibility to the community:

> "Well, first of all, I don't think this man is a writer, and I don't think this is a book. I think it is the ramblings of a pervert and it's not that—you know, it seems like morality is a dirty word around here. But we have codes that we live by. They were started in Mount Sinai. And we have

traditions of ethics and I believe a writer like every other human being, has a responsibility. He has a duty to the people he is writing for and to himself" [p. 1099, lines 4-12].

Mr. Uris characterizes *Tropic of Cancer* as neither a book nor the work of a sane man:

"I don't believe, as I say, this is either a novel or a book. I don't think it is the work of a sane man. And I think he goes beyond every bound of morality that I have ever known in my life, everything that I have been taught.

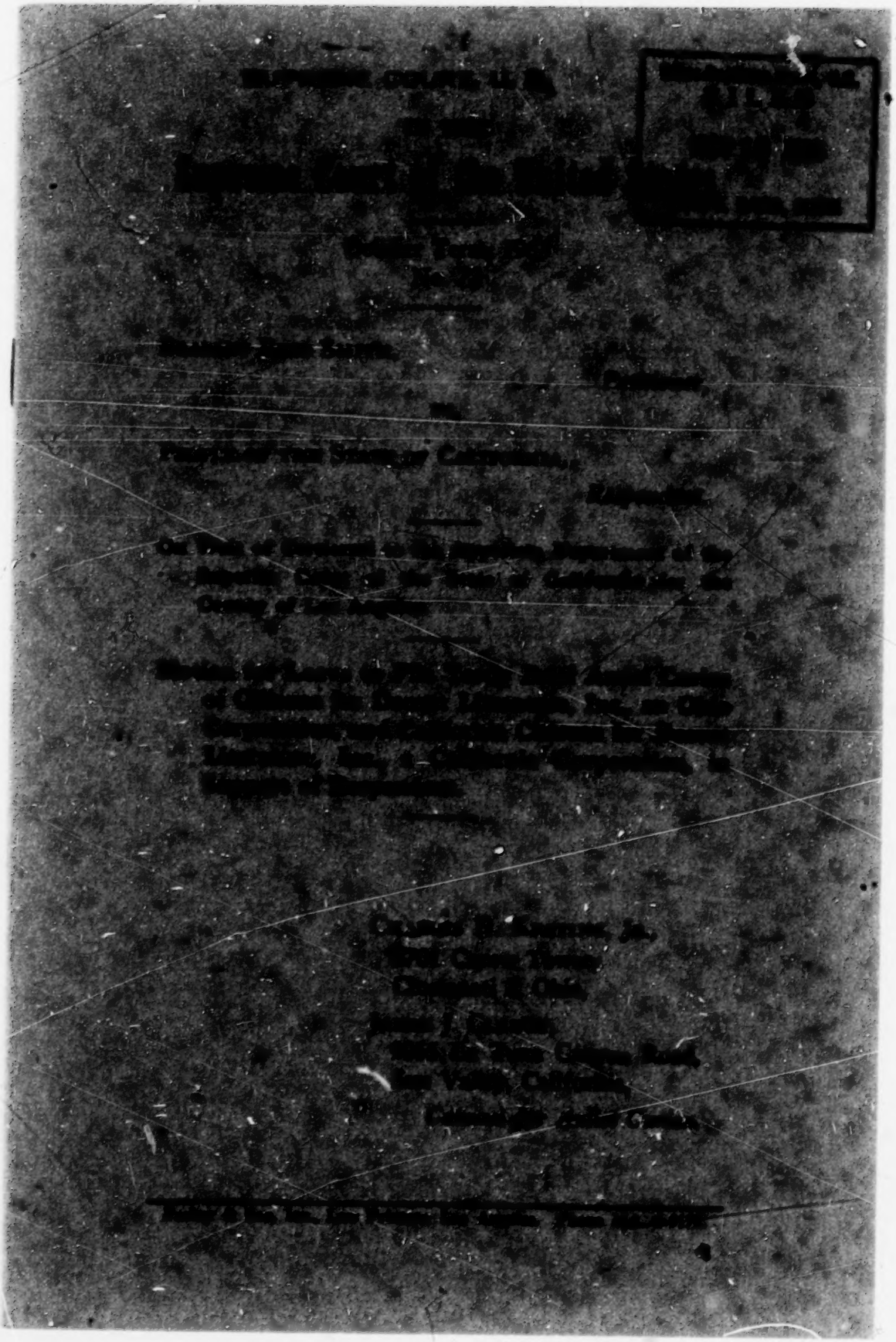
"And I am not ashamed to say that I believe I have morals" [p. 1099, lines 13-19].

Replying to defense testimony that *Tropic of Cancer* will lead to a more frank, less inhibited sex life for the average person in the community [Dr. Blake Nevius, Chairman of the English Department, U.C.L.A.]:

"Well, I think that the sexual descriptions are perverted for a good part. I don't think these are the sexual activities carried on by normal people" [p. 1104, lines 6-8].

Mr. Uris candidly describes the duty of the community when faced with such a book as *Tropic of Cancer:*

"I believe we have a right to defend ourselves against this type of garbage, the same way we would any other ordinary criminal or any pervert walking the streets of Los Angeles. I think we have a community duty to defend ourselves against this type of thing" [p. 1100, lines 21-25].



IN THE

Supreme Court of the United States

October Term, 1963
No. 72

BRADLEY REED SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Motion for Leave to File Brief Amici Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, and California Citizens for Decent Literature, Inc., a California Corporation, in Support of Respondent.

Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws. California Citizens for Decent Literature, Inc., a California

Corporation, operates as an affiliate of the national organization and is similarly dedicated.

The formulation of both organizations grew out of an impelling demand on the part of the larger segments of society, especially responsible fraternal, civic and religious organizations, which seek to bring under control the nationwide dissemination of obscene literature.

For the Court's convenience both *amici curiae* are hereinafter referred to by the single short title, CDL.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with a sensationalized appeal to prurient interest, that threatens to overthrow the basic morality upon which our nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the court-room advocating the overruling of this "balancing of interest" interpretation in favor of an absolutist approach, aimed at nullifying the nation's basic obscenity laws.

At its recent national convention in Chicago during October of 1963, the national organization of Citizens for Decent Literature adopted a policy aimed at giving increased support in the fight against "obscenity", through legal advocacy in the court-room in support of the people's case. Such action made possible, for the first time, the filing of the brief referred to herein.

Concurrently herewith, *amici curiae* have filed a motion for leave to file a brief in support of the petitioner in, Petition for Writ of Certiorari, *Arnebergh v. Zeitlin*, in the Supreme Court of the United States, October Term, No. 584. It is submitted that the following arguments to be presented in said Zeitlin motion, apply with equal weight and should be presented for the court's consideration herein, with additional argument on questions already raised in the briefs on file:

(1) A jury's finding of "obscenity" is final.

(2) The determination of "obscenity" is primarily an issue of fact, and the Court's review is limited to the question, "whether or not reasonable minds may differ that the matter is obscene."

(3) "Tropic of Cancer", as a matter of law, is without the area of protected speech and press as that line is drawn in *Roth v. United States* and *Alberts v. Calif.*, 354 U. S. 476, 1 L. Ed. 2, 1498 (1957), whether that line be drawn at "obscenity" or "hard-core pornography".

(4) Freedom of speech and the press, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and as construed in *Roth v. United States* and *Alberts v. California* (*supra*) and other decisions of this court, do not limit the proscription of state obscenity laws to the suppression of "hard-core" pornography only.

The *Zeitlin* case and the *Bradley Reed Smith* case herein are cases of nationwide and historical importance, which will have a serious effect on enforcement of the obscenity statutes throughout the nation. Motion is therefore made under Rule 42(2), 28 U. S. C. A. for leave to file a tardy brief *amici curiae* in support of respondent herein. On November 13, 1963, counsel for *amici curiae* posted airmail letters to counsel of record for the parties in the above entitled cause, requesting their consent to the tardy filing of this brief *amici curiae.*

Respectfully submitted,

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JAMES J. CLANCY,
Counsel for Amici Curiae.